No. 16,173

United States Court of Appeals

For the Ninth Circuit

PETER CROCKETT JACKSON, a minor, by John E. Walker, his Guardian ad Litem, *Appellant*,

vs.

THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association; DAVID LLOYD DAVIES; THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association, and DAVID LLOYD DAVIES, as Executors under the purported will and testament of Maria C. Jackson, deceased; THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association, and DAVID LLOYD DAVIES and WILLIAM W. KNIGHT, as purported Trustees appointed by said purported last will and testament; and BLACK WHITE FOUNDATION, a corporation, *Appellees*.

OPENING BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Constitutions

Statutes

Rules

Texts

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OPENING BRIEF FOR APPELLANT.

I. STATEMENT OF JURISDICTION.

1. Jurisdiction of the District Court.

This is an appeal (R. 115-116; 121)[1] from a final judgment of dismissal, based upon the District Judge's

[1] "R" refers to the printed Transcript of Record and the numerals which follow designate the page or pages.

view that the United States District Court had no jurisdiction over the subject matter, "but without any adjudication upon the merits of any of plaintiff's claims and without costs to or against any of the parties" (R. 112-115). The judgment was ordered on the basis of the first amended complaint and without other pleading or evidence.

The first amended complaint alleges that the appellant is a resident and citizen of California; that appellees are residents and citizens of Oregon, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) (R. 55-56).[2] Accordingly, the District Court by virtue of Article III, Section 2(1) of the Constitution of the United States, and Title 28 of the United States Code, Section 1332, had jurisdiction of appellant's action.

2. Jurisdiction of the Court of Appeals.

The judgment of dismissal was signed on July 22, 1958, and filed on July 23, 1958. It was entered in the Civil Docket on July 22, 1958 (R. 114-115; 121). Appellant filed his notice of appeal on July 24, 1958. Sections 1291 and 1294 of Title 28 of the United States Code declare that this Court has jurisdiction of appeals taken from all final decisions made by said District Court. Rule 73(a) of the Federal Rules of Civil Procedure provides that the time within which an appeal may be taken shall be thirty (30) days from the entry of such judgment or decision, and that such an appeal may be taken by filing a notice of appeal in the District Court. Therefore, this Court has jurisdiction to review the judgment.

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[2]The same allegations appear in the original complaint (R. 6-7).

II. STATEMENT OF THE CASE.

1. The Facts Alleged in the Amended Complaint.

The recital of facts which follows is based on the allegations of the first amended complaint.[3]

This action was brought by appellant, a minor citizen of California, approximately 14 years old, by his guardian *ad litem,* against the appellees herein, three citizens of the State of Oregon. Two of these are natural persons, and the third is a banking corporation (R. 55). Two of the appellees are sued individually and as purported executors of the purported last will and testament of Mrs. Maria C. Jackson, deceased, and all three are sued both individually and as purported trustees of a trust which is eventually to evolve into a foundation under the terms of the will. This will was executed on January 7, 1948, and was amended and supplemented by a series of codicils.

Mrs. Jackson died on February 3, 1956, and was at the time of her death domiciled in Oregon. Appellant is a great-grandson of Mrs. Jackson, and ever since 1953 has been her *only* surviving lineal descendant, next of kin and heir at law (R. 55-56).

Through this will, and its codicils, Mrs. Jackson bequeathed most of her estate (valued at approximately $2,400,000.00) to a foundation. She left to appellant, her sole surviving lineal descendant, a bequest of One hundred fifty thousand dollars ($150,000.00) to be held in trust.

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[3]Where, as here, the action is dismissed for lack of jurisdiction, prior to the filing of a responsive pleading and before the taking of any evidence, the court accepts as true the allegations of the complaint. *Hills v. Eisenhart,* 256 F. 2d 609, 610 (9th Cir. 1958).

The particulars concerning this foundation and the will and codicils will appear later in this narrative.

Mrs. Jackson was the widow of Charles Samuel Jackson. Charles Samuel Jackson and Mrs. Jackson had two sons and no other children. These sons were Philip Ludwell Jackson and Francis Clopton Jackson. Philip Ludwell Jackson (hereinafter sometimes referred to as "Philip") had no issue. Francis Clopton Jackson had a son named Charles Samuel Jackson, Jr. Francis Clopton Jackson died in 1919 and, shortly thereafter, Mrs. Jackson duly and regularly adopted Charles Samuel Jackson, Jr., as her own son. Charles Samuel Jackson, Philip Ludwell Jackson, Francis Clopton Jackson, and Charles Samuel Jackson, Jr. predeceased Mrs. Jackson. Charles Samuel Jackson, Jr. left one child, Peter Crockett Jackson, who is the appellant herein (R. 57-58).

At the time of her death, Mrs. Jackson owned all or the majority of the stock of the Journal Publishing Company, a corporation. The Journal Publishing Company is, and was, the owner and publisher of the "Oregon Journal," a daily newspaper published in Portland, Oregon. The "Oregon Journal" was founded approximately 45 years ago and is, and has been for many years, a great and powerful newspaper. The stock of the Journal Publishing Company is by far the most valuable asset of Mrs. Jackson's estate. In the inventory and appraisal of the estate filed by the appellee executors, in the state probate court, the stock of the Journal Publishing Company is given a value in excess of One million five hundred thousand dollars ($1,500,000.00) (R. 59).

The "Oregon Journal" was founded by Mrs. Jackson's husband, Charles Samuel Jackson, approximately 45 years ago. Charles Samuel Jackson during his lifetime was the publisher and director of the policies of the "Oregon Journal." Mrs. Jackson, during the lifetime of her husband and thereafter, took great pride in and had great affection for this newspaper. It was, therefore, her constant preoccupation and desire to perpetuate and keep control thereof within the Jackson family. During his lifetime, Charles Samuel Jackson owned all, or the great majority, of the stock of the Journal Publishing Company, which, on his death, went to his widow, Mrs. Jackson. She retained this stock until her death (R. 62).

Appellee David Lloyd Davies is a practicing attorney who was admitted to the bar of the State of Oregon in 1927. Mr. Davies was, at the time of Mrs. Jackson's death and for many years prior thereto, her personal attorney, as well as the attorney for the Journal Publishing Company and the Oregon Journal. As such attorney, Mr. Davies had full information and knowledge regarding the nature and value of her properties, including her stock in the Journal Publishing Company. Mrs. Jackson reposed great trust and confidence in Mr. Davies and had a very high regard for his legal and business ability. She therefore sought and followed his counsel in connection with important family and business matters. Mrs. Jackson likewise reposed great trust and confidence in her son, Philip, and also had high regard for his business ability. Accordingly, she sought and followed his counsel in connection with such family and business matters (R. 63). In making the will executed on January 7, 1948, Mrs.

Jackson sought and obtained the advice of Philip and Mr. Davies. Mr. Davies drafted the will and its codicils (R. 64).

At the time when this will was under discussion, Philip and appellant were the only surviving lineal descendants of Mrs. Jackson. Philip was then publisher of the "Oregon Journal" and over fifty years of age. He had never had any children. Accordingly, Mrs. Jackson desired by means of her will to provide generously for appellant, and to give him the right and opportunity to come into control of the newspaper as owner, publisher and editor. Philip and Mr. Davies were told by Mrs. Jackson of her desires with respect to appellant and were asked for their counsel and advice with regard thereto (R. 64).

At or about the time that Mrs. Jackson sought their advice, Mr. Davies and Philip determined that Mrs. Jackson would make a will under the terms of which appellant would receive nothing and whereby they would obtain control of her assets, including her stock holdings in the Journal Publishing Company. Pursuant to this determination, Philip and Mr. Davies represented to Mrs. Jackson that any disposition of her estate as she desired would result in an assessment of Federal estate taxes which could not be met without selling her shares in the Journal Publishing Company to outsiders who would then obtain control of the "Oregon Journal." Philip and Mr. Davies also represented to her that in order to preserve the "Oregon Journal" it would be necessary to avoid large estate taxes, and that this could be accomplished only by placing substantially all of her estate in a tax free foundation. These representations were then, as now, untrue

and known by Mr. Davies to be untrue. These representations were also either known to be untrue by Philip at that time, or were negligently made and without reasonable effort to ascertain whether they were true or false (R. 64-65).

These representations were then, as now, untrue because Mrs. Jackson's estate always had sufficient assets to pay the Federal estate taxes which would have been assessed had Mrs. Jackson made a will in accordance with her desires, without having to sell any of her stock holdings in the Journal Publishing Company (R. 65).

These representations were likewise untrue because the "Oregon Journal" could have been maintained and perpetuated as desired by Mrs. Jackson by leaving her share in the Journal Publishing Company, and no other property, to a tax free beneficiary. Mrs. Jackson, because of the great trust and confidence which she had in Philip and Mr. Davies, believed their representations and relied thereon (R. 65).

Philip and Mr. Davies, pursuant to said determination and by means of said representations, induced Mrs. Jackson to include a provision in her will, Article VI thereof,[4] giving the entire income of her estate to Philip for life and the remainder to a foundation. They told Mrs. Jackson that the foundation would receive the remainder of her estate, free of estate taxes. (In this will no provision was made for appellant.) In order to accomplish this

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[4]This statement is incomplete. Actually the complaint should have said, "Articles V and VI." The will, which is an exhibit to the complaint, shows that Article V provides the trust for Philip. Since Philip predeceased Mrs. Jackson, his trust is of no consequence on this appeal.

purpose, Philip and Mr. Davies utilized the trust and confidence which she reposed in them and her fear that the "Oregon Journal" would fall into the hands of strangers and out of the hands of the Jackson family. By so doing they were able to overcome her volition to the extent that, although she desired to provide for appellant, she nevertheless executed a will which reflected the purposes and desires of Philip and Mr. Davies and not her own (R. 66).

Philip had no desire to provide for anyone else out of his mother's estate. He had neither affection nor regard for appellant. By leaving the remainder interest to a supposedly tax free foundation, and thereby attempting to free the value of the remainder from taxes, Philip expected to and planned to receive the largest possible income for life by minimizing the Federal estate taxes, thereby preserving the maximum value for the corpus of the estate. As we have already stated in a footnote, Philip's death prior to the death of his mother thwarted this purpose.

Having set the method of disposing of the property of his mother, Philip acted in concert with Mr. Davies by means unknown to appellant, but well known to Mr. Davies, so that Mr. Davies drafted a will to accomplish their purposes (R. 66). In the will thus drafted and thereafter executed by Mrs. Jackson on January 7, 1948, there was included a clause whereby Mrs. Jackson disinherited appellant, who then was approximately five years of age (R. 67).[5] This will was signed and witnessed in the form

[5]Article VIII of the Will (R. 83).

required by law, and Mrs. Jackson was of sound and disposing mind when she executed it (R. 56).

The foundation was so planned that at the death of Philip, Mr. Davies, the bank, and a person selected by Mr. Davies, would, as trustees, control the foundation, the "Oregon Journal", and the Journal Publishing Company. The Jackson fortune and the prestige of a great newspaper were and are now sources of power, influence and prestige. The trustees holding this fortune and this newspaper with plenary powers and without substantial supervision or interference would be able to place themselves in a place of leadership and social and financial power by virtue of this control. In addition, the position of trustee would be lucrative, yielding substantial fees for life. In addition, Mr. Davies would, either directly or through others, act as legal counsel for the foundation, with additional substantial emoluments (R. 67).

In February, 1950, Mrs. Jackson added a codicil to her will, the subject of which was a bequest to Stanford University. In a further codicil, executed on August 15, 1952, she revoked the bequest to Stanford, having made other provisions for the same purpose. In the codicils she ratified and confirmed all of the provisions of the will of January 7, 1948 (R. 84-87). On February 27, 1953, after the death of Philip, Mrs. Jackson added another codicil to her will. In this codicil she created a trust of one hundred fifty thousand dollars ($150,000.00) for the benefit of appellant. The residue, comprising substantially all of her estate, was left to the foundation, as in the will of January 7, 1948. In this codicil Mr. Davies is named co-executor of the will. By means of this instru-

ment, Mrs. Jackson again ratified and confirmed the provisions of the will of January 7, 1948.

On July 8, 1953, Mrs. Jackson executed another codicil to her will. This codicil contains a provision whereby Mr. Davies would be one of a class of persons, *who under a certain set of circumstances would be able to buy the stock of the Journal Publishing Company at prices substantially lower than might be obtained if such stock were sold to persons not included in this class.*[6] In this codicil Mrs. Jackson again ratified and confirmed the provisions of her will of January 7, 1948 (R. 95-98). All of these codicils were signed and witnessed in the form provided by law, and Mrs. Jackson was of sound and disposing mind when she executed them (R. 68).

At no time was it ever disclosed to Mrs. Jackson by any person that the representations which induced her to make this will were untrue, although it was the duty of Mr. Davies and also of Philip to do so. By this concealment, Mr. Davies was able, after the death of Philip, to induce Mrs. Jackson, contrary to her natural inclinations, so to amend said will of January 7, 1948, by means of said codicils of February 27, 1953, and July 8, 1953, as to preserve and greatly to enhance the privileges and emoluments which were provided for him in said will. By this concealment, Mr. Davies was also able to prevent Mrs. Jackson from making a will under the terms of which appellant would have gained control of the "Oregon Journal", and a substantial portion of the balance of Mrs. Jackson's estate (R. 68-69).

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[6]All emphasis supplied by the writers, unless otherwise indicated.

All of the representations and influences which motivated, induced and caused the execution of the will of January 7, 1948, likewise induced, motivated and caused the republication of this will in the four codicils, in that nothing occurred to make Mrs. Jackson suspect or question the representations made to her, and Mr. Davies continued to be her trusted and confidential attorney (R 69).

At some time subsequent to 1953, Mrs. Jackson determined to make certain that her wishes as to appellant would be carried out, i.e., that he would come into control of the "Oregon Journal" and would also ultimately receive the bulk of her estate. She accomplished this by a will or codicil, a change in trust provisions, directions to trustees, or by some other means, all unknown to appellant. She made known to certain of her friends that she had completed such arrangement for appellant, but did not disclose the method whereby her purpose and desire had been accomplished. By such method the will and codicils above mentioned have been amended or revoked in such a manner that appellant would receive far in excess of the $150,000.00 provided for him in the codicil of February 27, 1953. The manner or method whereby Mrs. Jackson accomplished her purpose is known to the appellees, but not to appellant (R. 69-70).

The will, with its codicils, was admitted to probate in the Circuit Court of Multnomah County, Oregon, on February 7, 1956, less than four days after Mrs. Jackson's death. It was admitted to probate *in "common form", ex parte, and without notice to any person whomsoever.* The purported will, with its codicils, was admitted to

probate on petition of Mr. Davies and the appellee bank, who are named executors therein, and letters testamentary were issued to them on February 7, 1956. At the time that Mr. Davies applied for the admission to probate of said will and codicils he had knowledge of the method whereby Mrs. Jackson had accomplished her purpose and desires with respect to appellant (R. 56-57; 70).

Further facts to be considered in appraising the nature of the action brought and the relief sought by appellant will be found in certain express provisions of Article VI of the will, and the codicils which republish Article VI. These are the following:

1. There is created a perpetual trust to be known as the Jackson Foundation (R. 80).[7] The trustees thereof are to be Mr. Davies, appellee bank, and a third individual *to be appointed by Mr. Davies.* By codicil Mr. Knight, an appellee, was appointed the third trustee (R. 92). In the event of the death of a trustee, the surviving human trustee and the president of appellee bank are to select a substitute trustee. Thus the trustees are self-perpetuating.

2. The net income of the trust is to be "distributed by Trustees for use within the State of Oregon for charitable, educational, or eleemosynary purposes and for the advancement of public welfare". It is provided that the "trustees shall have wide discretion in the selection of the particular purposes for which said distribution shall be made and shall select beneficiaries as they shall deem to be most appropriate and best calculated to promote

[7]It is solely this trust which is under attack. The rest of the will is conceded to be valid.

the welfare of the public of the City of Portland or the State of Oregon, or both'' (R. 80).

3. The Trustees in any disposition of the stock of Journal Publishing Company shall ''endeavour to do so in such a manner as to perpetuate the 'Oregon Journal',[8] . . . as a newspaper which conforms generally to the standards of that newspaper since the founding thereof by my late husband . . . If it may be done without jeopardy to the standing of said newspaper, the trustees shall endeavour to give preference to persons actually in the employ of Journal Publishing Company and engaged in the publication and operation of the newspaper . . . I give to the trustees broad powers, to be exercised in their discretion, in accomplishing the purposes and policies expressed in this paragraph'' (R. 80-81).

4. The trustees are given unlimited powers in the investment and reinvestment of the trust property. They may sell, exchange, mortgage or otherwise dispose of trust property as they see fit (R. 81-82).

5. The stock of the Journal Publishing Company shall not be used to pay debts, taxes or legacies unless the other assets of the estate (other than personal chattels) are exhausted (R. 82-83).

6. The trustees may retain the stock of the Journal Publishing Company as an investment even though it might form a substantial portion of the trust estate. If the trustees should ever consider it to be in the best interests of the ''Oregon Journal'' or in the best interests

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[8]This provision of Article VI calling for the *perpetuation* of the "Oregon Journal" is unqualified, and is therefore mandatory.

of the trust estate to sell any of the stock, they should so do, but if possible the ownership and control of the Journal Publishing Company and the newspaper should be retained on a local basis, "preferably *in the hands of persons who are then in the actual employ of the Journal Publishing Company or who are associated with the management and operation of the paper.*" Then comes a provision which is most significant. Quoting from the codicil: "I *direct* that in any disposition of such stock, the purpose herein stated shall be carried out even though *the amount which may be realized may be very substantially less than might be obtained if such stock or the paper were to be sold in a different manner or to other purchasers.* . . . I direct that any person or persons *within the categories above* specified who may also be at any given time an *executor* of my will, or *trustee* of any of the trusts created by my will . . ., shall be permitted and eligible to purchase stock at the same prices and on the same terms as my executors or trustees are willing to sell to others *within such preferred categories* of purchasers, *even though such person or persons may be acting as such executor or trustee*" (R. 96-97).

The foregoing provisions of the will seem intended to create a charitable trust. However, this trust is most uncertain and indefinite as to its objects. The trust provisions also show with complete certitude that *the real objective of the testatrix is to perpetuate a newspaper business and to carry on such business through a purported, but not an actual charity.* They also show that *the major portion of Mrs. Jackson's estate in the untrammeled and absolute discretion of the trustees might*

be used for the financial benefit of a limited class of persons, including Mr. Davies (an executor and trustee) and Mr. Knight (a trustee) and not for charitable purposes. Moreover, as long as the trust lasts, the successor trustees, selected by surviving trustees, may acquire the Oregon Journal at any price.

These facts are the basis for six separately stated claims for relief, which are set forth in the first amended complaint. Only the facts material to each claim are respectively alleged.

2. The Relief Sought by Appellant.

Appellant seeks the following relief in his amended complaint:

First Claim for Relief.

To have adjudicated invalid the provisions of the will which create the trust, because the purposes of the purported charitable trust are so indefinite and uncertain that the same cannot be executed and carried out, and because the discretion accorded the trustees therein is so wide and indefinite that their consciences cannot be held to the carrying out of a definite and certain purpose under the supervision of a court of equity (R. 58).

Second Claim for Relief.

To have adjudicated invalid all the provisions of the will creating the trust for these reasons:

(a) The alleged charitable trust has for its purpose and achieves only the results of avoiding taxes and of creating a perpetual trust whereby a group of persons,

self-perpetuating by express provision, are vested with plenary powers to use the trust property, including the Journal Publishing Company and the newspaper owned and published by the Company for their personal profit and advantage, with charity as a secondary and subordinate incident (R. 60-61).

(b) Through the mandatory directions contained in the will with respect to the sale of the stock of the Journal Publishing Company or the "Oregon Journal," the major portion of the fortune bequeathed to the trust may, in the untrammeled discretion of the trustees, be used primarily for the financial benefit of a limited class of persons employed in the business of the Journal Publishing Company, *including the executors and trustees* and their successors, in effect appointed by themselves, and not for charitable purposes.[9]

Accordingly, the provisions of the trust are against the public policy of the State of Oregon and create a perpetuity in violation of law (R. 61-62).

Third Claim for Relief.

To have adjudicated that the will and codicils have been amended or revoked in such manner that appellant would have come into control of the "Oregon Journal" and would have received far in excess of the bequest provided for him in the codicil of February 27, 1953 if the documents involved had not been withheld, and to impress a trust for appellant's benefit on any money and property

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[9]Such a trust is not charitable. See Restatement of Law of Trusts, vol. 2, sec. 376, p. 1166; *Benton County v. Allen,* 170 Ore. 481, 133 P. 2d 991 (1943).

which the trustees might receive pursuant to Article VI of the Will (R. 62-70).

Fourth Claim for Relief.

To have adjudicated invalid all the provisions of the will relating to the trust on the ground that they are the product of fraud on the part of Mr. Davies and Philip Jackson (R. 70-71).

Fifth Claim for Relief.

To have adjudicated invalid all the provisions of the will relating to the trust on the ground that they are the product of undue influence exercised by Mr. Davies and Philip Jackson on Mrs. Jackson (R. 71-72).[10]

Sixth Claim for Relief.

To have it adjudicated that as to all the property bequeathed to the trust, Mrs. Jackson died intestate, and directing respondents to take appropriate steps to have this property distributed to appellant through the state probate court as Mrs. Jackson's sole heir at law and next of kin (R. 72-74).

The only provisions of the will which appellant seeks to have the court adjudicate to be invalid are those creating the alleged charitable trust. He does not attack any

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[10]A situation closely paralleling that alleged in the amended complaint was held to show undue influence in *Teter v. Spooner,* 279 Ill. 39, 116 N. E. 673 (1917) and *Ziegler v. Coffin,* 219 Ala. 586, 123 So. 22 (1929). Oregon cases uniformly hold that enrichment of the attorney who draws the will raises a presumption of undue influence. *Weeks v. O'Neill,* 165 Or. 575, 108 Pac. 2d 775 (1941); *Lyon v. Wilson,* 173 Or. 414, 145 Pac. 2d 808 (1944). See infra.

other provisions of the will on any ground. Appellant does not question the due execution of the will, nor does he contend that Mrs. Jackson was not fully competent to dispose of her estate by last will and testament (R. 56).

III. THE DECISIONS OF THE DISTRICT COURT.

1. The First Decision: Dismissal of the Original Complaint.

In appellant's original complaint (R. 6-20), there are set forth most of the facts which are alleged in the first amended complaint. In the original complaint plaintiff's claims were not separately stated. Appellees moved to dismiss the original complaint prior to the filing of a responsive pleading and before the taking of any evidence. This motion read as follows:

> "The defendants move the court to dismiss this action *on the ground that the court lacks jurisdiction over the subject matter because* the action is essentially *a proceeding to contest a will* and therefore one within the exclusive jurisdiction of the state probate courts." (R. 24.)

The District Court granted the motion (R. 54), but not entirely on the ground urged by appellees. The District Court dismissed the action because it felt (erroneously, we submit) that since it did not have jurisdiction over the *"main"* controversy, presented by the complaint—the claims for relief based on fraud and undue influence—it should dismiss not only those claims for relief, but also *all* claims for relief. The latter claims, according to the District Court, were *"subsidiary"* (R. 50, 52) to those based on fraud and undue influence. Just why perfectly

good causes of action for equitable relief were subsidiary was never developed by the learned District Judge, either by reason or authority. We will amplify this thesis.

2. The Second Decision: Dismissal of the First Amended Complaint.

The order dismissing the original complaint provided, in part, that appellant "may amend this complaint if he is so advised" (R. 54). Pursuant to this provision of the order, appellant filed his First Amended Complaint.

Appellant's several claims were separately stated in the first amended complaint not only to correct an error in the form of the pleading to which the District Court had called attention in its opinion (R. 27),[11] but also for the purpose of showing the District Court that the claims for relief grounded on the invalidity and illegality of the trust and the revocation of the will were not "subsidiary" to the claims based on fraud and undue influence.

In due course the appellees moved to dismiss the first amended complaint on the *same ground* upon which they had moved to dismiss the original complaint, to wit, "that the court lacks jurisdiction over the subject matter because the action is essentially a proceeding to contest a will and therefore one within the exclusive jurisdiction of the state probate courts" (R. 112).

Pursuant to this motion, the District Court dismissed the first amended complaint on the same grounds and for the same reasons that it dismissed the original complaint. The order of dismissal reads, in part, as follows:

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[11]In its Memorandum, the District Court said, "plaintiff asserts at least four separate claims or causes of action, *but these are not separately stated*" (R. 27).

> It appearing to the Court that the first amended complaint presents in substance nothing more than a rearrangement of the claims asserted in the original complaint (cf. *Stark v. Starr,* 94 U.S. 477, 485 (1876)), and that the motion to dismiss should be granted *upon the grounds and for the reasons stated upon the dismissal of the original complaint* (see *Jackson v. United States National Bank, Portland, Oregon,* 153 F. Supp. 104 (D. Ore. 1957).
>
> It is further ordered that defendant's motion to dismiss is hereby granted for want of federal equity jurisdiction over the subject matter; . . . (R. 112).

In short, the action was dismissed on the grounds and for the reasons stated in the Court's "Memorandum of Decision".

In order to ascertain what motivated the District Court's decision and what are the real issues on this appeal, we must turn to the District Court's memorandum. This is the first step in establishing the foundation for our specifications of error and our argument.

IV. SUMMARY OF THE COURT'S MEMORANDUM OF DECISION.

Here we will outline the opinion of the District Judge upon which he based his judgment of dismissal. On occasion, we will take the liberty of commenting on some parts of the opinion, in order that obvious errors may be brought to this Court's attention.

The Court first says that in order to determine whether this "diversity case can be counted among 'all civil actions' within the meaning of 28 U.S.C.A. Sec. 1332, it

is necessary to consider the nature of the relief sought" (R. 27). The Court concluded that the relief sought was set forth in "*at least four separate claims or causes of action, but these are not separately stated* (Fed. R. Civ. P. 10(b)) (p. 5.)" (R. 27). Rule 10(b) provides for separate statement to facilitate clear presentation. (Because we believed that the Court's mild criticism was well founded, we have separately stated our case in six separate claims for relief.)

The District Court then went on to list the various types of relief sought, as follows:

> *First,* plaintiff seeks an adjudication that certain provisions of the Jackson will and codicils, which establish a testamentary trust, are invalid, because not the will of the testatrix, having been obtained by claimed acts of fraud and undue influence.
>
> *Second,* plaintiff seeks a judgment declaring that, even if the trust provisions are the will of the testatrix, the testamentary trust is nonetheless invalid, because (a) the purpose of the trust is so indefinite and uncertain, and the powers of the trustees so broad and indefinite, that the trust cannot be enforced by a court of equity; and (b) the trust is perpetual in duration without being primarily charitable in character, and so is a perpetuity in violation of Oregon law.
>
> *Third,* plaintiff seeks a judgment declaring that certain provisions of the will were amended or revoked by an alleged later, missing will or codicil; and
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> *Fourth,* a decree that as to all property not found by the court to have been disposed of by will, the testatrix died intestate, leaving plaintiff as her sole heir and next of kin (R. 27-28).

Thus the District Judge describes our separate causes of action substantially as they appear in the First Amended Complaint.

Having determined the relief sought, the Court concluded that this relief was *equitable in nature* (R. 28). Of this there can be no doubt. The next inquiry was whether the Court had " 'the power, that is, the jurisdiction to grant the relief prayed for' " (R. 29). The opinion then established as a major premise that the *equity* jurisdiction vested by Congress in the Federal Courts, when sitting in equity, was exclusively that which was exercised by the English Court of Chancery at the time (1789) when the American Colonies severed their political connections with England (R. 29). Next there was established as a minor premise the proposition that at the time of said severance, the "jurisdiction of the English High Court of Chancery did not embrace suits to set aside wills of either real or personal property, either because of fraud or undue influence upon the testator or because of the existence of a later will" (R. 29-30). On these premises, the Court drew the conclusion that it was without power, in the exercise of its equitable jurisdiction "to set aside a will or the probate thereof, or to administer upon the estate of decedents *in rem*" (R. 30-31).[12]

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[12]Citing: *Sutton v. English,* 246 U.S. 199, 205, 62 L. Ed. 664 (1918); *Farrell v. O'Brien,* 199 U.S. 89, 110, 50 L. Ed. 101 (1905); *Broderick's Will,* 88 U.S. (21 Wall.) 503, 517, 520, 22 L. Ed. 599 (1874); *Markham v. Allen,* 326 U.S. 490, 494, 90 L. Ed. 256 (1946); *Ellis v. Davies,* 109 U.S. 485, 494, 27 L. Ed. 1006 (1883); *Gaines v. Chew,* 43 U.S. (2 How.) 619, 645, 11 L. Ed. 402 (1844). These cases will be considered infra.

Having reached this conclusion, the District Court goes on to show that the Federal District Courts will not as a matter of *comity,* proceed to judgment *in rem* or *quasi in rem,* particularly in cases involving decedents' estates, "if jurisdiction over the res has previously been acquired by and continues in a State Court; *but may proceed to judgment in personam adjudicating rights in the res and leaving the in personam judgment to bind as res adjudicata the court having jurisdiction of the res*" (citing cases)[13] (R. 32-33). The principle of *comity,* says the Court, would prevent it from interfering with the Oregon Court's possession of Mrs. Jackson's estate (R. 33-34).

(May we point out that we have never sought to have the District Court take jurisdiction over the estate or in any manner or form to interfere with the due administration thereof by the Oregon probate court. We seek only *in personam* relief, which will determine the proper disposition, a disposition to be made by the Oregon courts.)

The District Court next holds that in addition to the limitations imposed by *comity,* there are other limiting factors in the exercise of its traditional equitable jurisdiction. It says that this jurisdiction "should be disavowed as to actions to which the State has closed its Courts"[14] (R. 34).

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[13]This is the rule upon which we rely. It is noteworthy that the learned District Judge does *not* cite in support of his statement the decision of this Court in *Blacker v. Thatcher,* 145 F.2d 255 (1944) (cert. denied). As to this case see infra.

[14]Citing: *Guaranty Trust Co. v. York,* 326 U.S. 99, 108, 89 L. Ed. 2079 (1945) (bar of state statutes of limitation); *Woods v. Interstate Realty Company,* 337 U.S. 535, 537, 93 L. Ed. 1524 (1949) (failure to comply with prerequisites to suit imposed by state statute); *Griffin v. McCoach,* 313 U.S. 498, 507, 85 L. Ed.

After having marked the areas within which its jurisdiction may not be exercised, the District Court points to other certain areas where this jurisdiction is not so limited. "Jurisdiction of the courts of the United States", says the Court, "cannot be impaired by the laws of the states" (R. 35). The Court then says:

> The federal courts may entertain actions, within their diversity and historic-equity jurisdiction, involving claims to decedents' estates, "notwithstanding the fact that the laws of the State limit the right to establish such demands to a proceeding in the probate courts of the State. (Citing *Security Trust Co. v. Black River National Bank,* 187 U. S. 211, 227; 47 L. Ed. 147 (1902); *Griffith v. Bank of New York,* 147 F. 2d 899 (2d Cir.), cert. denied, 325 U. S. 874 (1945); *Blacker v. Thatcher,* 145 F. 2d 255-257; 9th Cir. 1944, cert. denied, 324 U. S. 848; 89 L. Ed. 1409 (1945).

(In the *Security Trust* case, the Supreme Court held that a non-resident creditor could establish his claim against the estate of a decedent in a federal court action against the administrator, even though the state law limited the creditor to a proceeding in the probate court. In the *Griffith* case, a non-resident legatee was permitted to sue a testamentary trustee in the federal court to set aside a decree approving the trustee's account on the ground of fraud, notwithstanding a state law provision that such proceeding could be brought only in the Sur-

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1481 (1941) (action based on contract violative of State's public policy); *Williams v. Minn. Mining & Mfg. Co.,* 14 F.R.D. 1, 9 (S.D. Cal. 1953) (Claim under California Workmen's Compensation Act). We have some difficulty in perceiving the application of these decisions to our case.

rogate's Court. In *Blacker v. Thatcher,* this Court upheld federal jurisdiction in a suit by a non-resident heir-at-law to have a clause in a will construed in order to prove intestacy. This Court so adjudged, despite the fact that under the applicable state law (Montana), such an action was deemed to be an *in rem* proceeding within the exclusive jurisdiction of the state probate court.[14a])

Returning to the District Judge's opinion, he went on to show that any action *in personam* concerning estates of decedents would lie in the federal court, irrespective of the state law. On this subject, Judge Mathes said:

> If, then, a right involving a decedent's estate is such as would have been enforceable in the English Court of Chancery in 1789 and is such as would be enforceable in an action in personam in some court—*even a probate court of the state*—a suit to enforce that right may be maintained in a federal court of equity as an action in personam if diversity of citizenship and the requisite jurisdictional amount exist (R. 35).[15]

(This is exactly what was said in this Court's opinion in *Richardson v. Green,* 61 Fed. 423 (1894); cert. denied, 159 U. S. 264, 40 L. Ed. 142 (1894) concerning which something will be said later in this part of our brief and much more will be said when we argue the subjects of undue influence and fraud.)

[14a]*Blacker v. Thatcher* conclusively establishes that the District Court's decision was erroneous in all of its phases. For this reason a full discussion of the *Blacker* case is postponed to a later section of this brief.

[15]Citing: *Markham v. Allen,* 326 U.S. at 494, 90 L. Ed. 256 (1946); *Waterman v. Canal Louisiana Bank and Trust Co.,* 215 U.S. at 43, 54 L. Ed. 80 (1909); *Payne v. Hook,* 74 U.S. (7 Wall.) at 430, 19 L. Ed. 260 (1868); Id. 81 U.S. (14 Wall.) 252, 20 L. Ed. 887 (1871).

Then follows a statement which, to our minds, clearly upholds jurisdiction of all claims for relief in the amended complaint. Judge Mathes says:

> On the other hand, if a right involving a decedent's estate is by state law made enforceable in an action in personam in a State court—rather than solely in rem in probate proceedings, a diversity suit to enforce the right in the federal courts is a "civil action" within 28 U.S.C. § 1332 (R. 36-37).

Next, the Court examines the applicable Oregon law for the purpose of determining whether that State grants to litigants, situated as appellant is, the privilege of seeking to set aside a will or its admission to probate "either upon the grounds of undue influence or fraud, or upon the ground that the will admitted to probate is not the last will" of the decedent in a plenary suit or action *in personam*. The Court concludes, after an exhaustive study of the applicable statutes and cases, that in Oregon there cannot now be a plenary suit *in personam* to revoke probate of a will, and that all such proceedings are *in rem* and within the exclusive jurisdiction of the Oregon probate court—a court of limited jurisdiction (R. 38-44).

(This conclusion, we submit, is erroneous. It is directly contrary to this Court's holding in *Richardson v. Green,* supra.)

Since we learned our procedure for the State of Oregon from *Richardson v. Green,* we heavily relied upon this decision in our briefs on the first motion to dismiss. The District Court therefore dissected *Richardson v. Green,* and determined that it was not controlling because (a) the portion of the opinion upon which we rely is said

to be *dictum,* and (b) because a statute passed in 1893 by the Oregon legislature, conferred exclusive jurisdiction of such actions upon the Oregon County Courts, acting as probate courts.

(It should be noted that, when *Richardson v. Green* arose, the Oregon County Courts *were the only courts* wherein actions to contest the validity of a will, or a part thereof, could be tried. Then, as now, County Courts were courts of limited jurisdiction, whether acting as probate courts or otherwise. However, as *Richardson v. Green* says, although these courts were of limited jurisdiction, they could entertain actions *in personam* in cases involving contests of wills.)[16]

The District Court having thus disposed of *Richardson v. Green,* held that it was without jurisdiction to declare invalid the portions of Mrs. Jackson's will which are alleged to be the product of fraud and undue influence. The District Court did hold, however, that appellant's claims for relief wherein he seeks to have construed and declared invalid the trust provisions of the will as being contrary to law and public policy of Oregon are *"within the historical scope of federal equity jurisdiction"* (R. 47-48). The Court also held that a portion of the original complaint, if viewed as a claim to impose a constructive trust on the ground of fraud on the part of the executor, allegedly perpetrated in petitioning for admission to probate of a prior will, while withholding a later and missing will, "may be construed" to fall within its equity juris-

[16]To avoid repetition we will discuss *Richardson v. Green* and the Oregon law fully in our argument concerning the fourth and fifth claims (fraud and undue influence).

diction. Finally, the Court decided that appellant's claim to all property as to which Mrs. Jackson might have died intestate, "also falls within the scope of federal equity jurisdiction to adjudicate *in personam* the validity and amount of the claims of heirs and others to estates in probate" (R. 48-49).

The District Court, after making these rulings, disavows and rejects jurisdiction over the very claims of appellant *which the Court holds to be within its equitable jurisdiction.* What possible basis was there for any such extraordinary denial of jurisdiction? The opinion tells us the learned Judge's reasoning in that behalf.

Judge Mathes first says that in one cause of action plaintiff seeks "this court's *construction* of the terms of the testamentary trust which plaintiff *alternatively* seeks to set aside as invalid for fraud and undue influence upon the testatrix" (R. 50). Then comes the Court's sole basis for refusing to try causes of action which are plainly, and are admitted by him to be, within his jurisdiction.

> Being without jurisdiction over the issue as to the validity of the testamentary trust itself, this court does not, in the exercise of equity jurisdiction, reach the *alternative,* and in effect *subsidiary,* cause of action to construe the provisions of the trust (Id.).

(Assuming that the causes of action were alternative, the District Court would be compelled to take jurisdiction by reason of the provisions of rules 8(e) and 18(a). Obviously, the claims are not alternative because plaintiff could succeed in all six of his claims. The word "alternative" means a choice between two things "either of which may be chosen, but not both" (*Webster's New Interna-*

tional Dictionary). The word "subsidiary" means "supplementary," "auxiliary," "tributary," "subordinate," or "secondary" (id.). It must be obvious that all of our causes of action have equal dignity excepting the sixth cause of action, which is clearly auxiliary.)

Having thus been led into error, even in the meaning of words, the District Court goes even farther afield with the quotation of the maxim of equity that:

> "A court of equity ought to do justice completely and not by halves."

The Court applies this maxim to our case upon the theory that until the validity of the trust provisions have been adjudicated in the Probate Court of Oregon (i.e., whether the trust was the product of fraud or undue influence), the District Court "could not 'do justice completely'" (R. 50-51).

The equitable maxim as to disposing of the whole controversy does not support the Court's view. The maxim means that if a court of equity takes jurisdiction, it will dispose of the whole case if it can do so. It does not mean that if the Court has jurisdiction, it will dismiss the case because it is without jurisdiction of one or more phases of the case. The Court will no more dismiss such a case than it would do so because of inability to get jurisdiction over a necessary party (*Payne v. Hook,* 74 U.S. 425; 19 L. Ed. 260 (1869)). "Moreover, the doctrine is subject to important limitations and in its application care must be taken not to . . . deprive litigants of their *fundamental rights such as the right of . . . choice as between different forums*" (30 C.J.S. *Equity,* p. 419).

It may be, although it seems highly unlikely, that Judge Mathes meant to say that if the federal court retained the controversies over which it obviously had jurisdiction and rejected fraud and undue influence, then the Oregon Court might hold that appellant had lost his rights in that Court. In other words, if the federal court takes any jurisdiction at all, no other court will touch the case, irrespective of the federal court's rejection of jurisdiction as to a part of the case. We cannot believe that this is what the learned District Judge intended to hold. If it was, then it would only be necessary for him to glance at the many cases in which the federal court has taken jurisdiction of the patent phases of litigation, while rejecting phases which are not within its jurisdiction (see infra).

Again, returning to the Court's opinion, it is correctly said that the "fourth cause of action" (the sixth cause of action in the amended complaint) is secondary and auxiliary. Therefore, if the Court had no jurisdiction of *any* of the other causes of action, the auxiliary cause must fall (R. 51). The fourth (sixth) cause of action involves a claim for an adjudication of heirship in the event of partial intestacy. This is a truly subsidiary claim. The difference between a subsidiary claim and the primary claims of invalidity of the trust on five different grounds, all of equal dignity, must be obvious.

Next, Judge Mathes holds that the third cause of action (also the third cause of action in the amended complaint) asserts a claim to have declared a constructive trust based upon the existence of a later will or some other document which makes provision for the appellant. This, the

Court says, is "merely an incidental aspect of the whole controversy." The Court admits that this is a claim of "suppression of a later, missing will or codicil." (R. 52). This is precisely the case which was held to be within federal jurisdiction in *Gaines v. Chew,* 43 U.S. 619, 11 L. Ed. 402 (1844). How is it possible for a fraud upon the living (appellant), by means of suppressing a document, to be subsidiary or secondary to claims of fraud and undue influence practiced upon the dead (Mrs. Jackson)?

Finally, it is held that the "discretionary refusal" to refuse jurisdiction is made "in the light of plaintiff's unquestioned anl current right to seek in the proper probate court of the State of Oregon all the relief which he seeks here." Suffice it to say that this remark, standing alone, would be a sound reason for the federal court to refuse jurisdiction in all diversity cases. All parties have entrée into the state Court.

Next comes a statement which is nothing less than amazing. The Court refers to "the high probability that if this Court were to retain jurisdiction of a part of the controversy under the circumstances, plaintiff might indeed confront a situation where the Oregon Court itself would refuse to do justice 'by halves'." (R. 52.)

(This flies directly in the face of every United States Supreme Court decision on the subject. The state Court must follow the final adjudication of the federal Court as to devolution of the estate. On this point, it is sufficient to quote from *Markham v. Allen,* 326 U. S. 490, 90 L. Ed. 256 (1946). This case went to the Supreme Court from this Circuit. In sustaining federal jurisdiction to deter-

mine the ownership of property in probate, the Supreme Court held that the federal Court may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state Court's possession *save to the extent that the state Court is bound by the judgment to recognize the right adjudicated by the federal Court* (Citing cases) (326 U. S. 494, 90 L. Ed. 260). See also: *Gaines v. Chew,* 43 U.S. 619, 11 L. Ed. 402 (1844); *Spencer v. Watkins,* 169 Fed. 379 (8th Cir. 1909); *Wood v. Paine,* 66 Fed. 807 (C.C.D. R. I. 1895), cited infra. The principle thus stated is so simple and so commonplace that we cannot understand how the District judge could reach a contrary conclusion.

And so on the basis of the reasoning which we have stated and briefly analyzed, the Court denied jurisdiction and dismissed the action.

V. ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

1. The District Court erred in dismissing the claims for relief which it held to be within its equitable jurisdiction.

2. The District Court erred in dismissing any of the claims for relief.

3. The District Court erred in dismissing the action as a whole.

4. The District Court erred in deciding that in Oregon a contest of a will on the grounds of fraud and undue influence is not an inter partes action in personam.

5. The District Court erred in deciding that the Ninth Circuit's decision in *Richardson v. Green,* supra, is dictum.

6. The District Court erred in deciding that the Ninth Circuit's decision in *Richardson v. Green,* supra, is no longer binding because of changes in Oregon law.

VI. OUTLINE OF ARGUMENT.

(A) The District Court erred in dismissing the claims for relief which were obviously and admittedly within its jurisdiction.

(1) The District Court had jurisdiction over the first, second, third and sixth claims for relief.

(2) Irrespective of the Federal Court's jurisdiction over the fourth and fifth claims, the dismissal of the first, second and third claims violated Rules 8(e) and 18(a) of the Federal Rules of Civil Procedure.

(3) The District Court was led into error by mistakenly assuming that the attacks upon the trust were premature and by misunderstanding the nature and effect of equity's disinclination to do justice by halves.

(B) The attack upon Article VI of the will as amended by the codicils upon the grounds of fraud and undue influence are proceedings in personam under the law of Oregon. Therefore the Federal Court has jurisdiction of such proceedings.

(1) A Federal Court action contesting the validity of Article VI on grounds of fraud and undue

influence does not divest or interfere with the state Court's jurisdiction of the res.

(2) If the state law permits a proceeding inter partes and in personam—even in a Probate court—to establish the invalidity of Article VI upon the grounds of fraud and undue influence, then the Federal Court will take jurisdiction of such action.

(3) Under the law of Oregon an attack on a will is a proceeding in personam and inter partes.

(4) The only case in any jurisdiction which has decided the question as to whether a will contest in Oregon is inter partes and in personam or in rem is *Richardson v. Green.* That case holds that a contest is inter partes. It is still law.

VII. ARGUMENT.

(A) THE DISTRICT COURT ERRED IN DISMISSING THE CLAIMS FOR RELIEF WHICH WERE OBVIOUSLY AND ADMITTEDLY WITHIN ITS JURISDICTION.

(Specifications of Error 1, 2, 3.)

The District Judge held in his opinion that he had jurisdiction over the claims for relief in the original complaint which are now the first, second and third claims for relief in the amended complaint. The first claim had for its object an adjudication of invalidity of the so-called trust (Article VI) upon the ground that it was indefinite and uncertain. The second claim was the attack upon the same Article upon the ground that personal profit was the primary purpose and charity the secondary purpose of the trust and that there was a specific provision

for financial benefit to a limited class of persons, including the executors and trustees. The third claim sought an adjudication that there was a later provision for the plaintiff so that a trust was impressed upon any money or property which the trustees might receive pursuant to Article VI.

It appears to us that the opinion also upholds the sixth claim, which seeks adjudication that as to all property bequeathed to the trust, Mrs. Jackson died intestate and requires the executors and trustees to take appropriate steps in the Oregon probate Court to have the property distributed to Peter Jackson. Of course, the sixth claim will not come into play unless Jackson succeeds in one of the other claims for relief. The sixth claim is thus ancillary to the other claims. It invokes, in effect, the use of the precise method whereby the federal Court will give the relief sought without interfering with the administration of the estate by the state probate Court (*Markham v. Allen,* supra).

So we may proceed upon the theory that the District Judge held that he had jurisdiction over the first, second, third and sixth claims for relief in the amended complaint. On the other hand, he held that he had no jurisdiction over the fourth and fifth claims upon the ground that one involved a charge of fraud and the other a charge of undue influence.[17]

Even assuming that the Court was right in its erroneous conclusion that it had no jurisdiction over the fourth and fifth claims, nevertheless it was error to dismiss the

[17]We will later show that the court had jurisdiction over the fourth and fifth claims as well as the first, second, third and sixth.

entire action. Rules 8(e) and 18(a) of the Federal Rules of Civil Procedure direct that the Court retain the causes which are properly before it. The cases are to the same effect. The rules and the cases both say that if several claims for relief are joined in one complaint, and the Court has jurisdiction over one but not all of the claims, the Court may dismiss the claims over which it does not have jurisdiction, but must retain those over which it has jurisdiction. As the first step in our demonstration that the dismissal of Claims 1, 2, 3 and 6 violates these rules, we will show that these claims were within the District Court's jurisdiction.

(1) The District Court Had Jurisdiction Over the First, Second, Third and Sixth Claims for Relief.
(Specifications of Error 1, 2.)

That this statement is sound is established not only by the holding of the learned District Judge but also by the cases of *Gaines v. Chew,* 43 U.S. 619, 11 L. Ed. 402 (1844), supra; *Spencer v. Watkins,* 169 Fed. 379 (8th Cir. 1909), supra; *Wood v. Paine,* 66 Fed. 807 (C.C.D.R.I. 1895), supra, and by the decision of *this very Court* in *Blacker v. Thatcher,* 145 Fed. 255 (9th Cir. 1944), supra, all cited in the opinion. The opinion cites a number of other cases along the same line, but we limit ourselves to cases which consider situations substantially similar to the claims now under discussion (R. 47-51).

Spencer v. Watkins and *Wood v. Paine* decided that the District Court had jurisdiction over the first and second claims, viz.: actions to invalidate charitable bequests on the ground that they were void under state law. *Gaines v. Chew* decided that the District Court had jurisdiction

over our third claim, viz.: An action to have executors declared constructive trustees on the ground of fraud. The *Blacker* case goes even further. It holds that the District Court has jurisdiction over an action to determine *the construction or validity of a will.*

In the *Spencer* case, heirs at law sued to void a charitable bequest on the ground that it was invalid under the law of the state of decedent's domicile. Defendants contended that the Circuit Court was without jurisdiction, "because the suit was not at common law or in equity, within the meaning of the Constitution of the United States and the Judiciary Act, but, on the contrary, was of a probate character, and pertained to the administration of an estate of a deceased person, of which the local probate Court was invested with exclusive cognizance by the Constitution and statutes of the state." (169 Fed. 380, 381).[18] The Circuit Court of Appeals decided to the contrary, holding:

> "We think that a controversy like that before us is not one strictly pertaining to probate and administration, but, on the contrary, has every element of a *plenary suit inter partes,* and that it belongs to a class of which the English Courts of chancery were accustomed to take cognizance as involving the execution of trusts. 3 Pomeroy's Eq. Juris., Sec. 1127. *The suit of the heirs was not a will contest in the customary acceptance of that phrase."* (382).

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[18]In our case, the motion to dismiss all the claims was based on "the ground that the court lacks jurisdiction and the subject matter because the action is essentially a proceeding to contest a will *and therefore one within the exclusive jurisdiction of the state probate courts."* (R. 112.)

Clearly, appellant's first and second claims for relief, wherein he seeks to void a charitable bequest, do not differ from the cause of action involved in the *Spencer* case.

In *Wood v. Paine* an heir at law sued to establish the invalidity of a bequest in trust to the town council of Coventry for the benefit of the poor of the town. In his bill, the heir asked that the bequest be declared null and void and that the executor be required to distribute to him his portion of that part of the estate which would otherwise go to the town council (66 Fed. 807-808). The Circuit Judge sustained his jurisdiction over the action, saying:

> "The will having been established by authority competent for that purpose, there seems to be no doubt of the jurisdiction of this court to determine questions as to the *interpretation* thereof in this case, in which the complainant is a citizen of Michigan, and all the respondents are citizens of Rhode Island . . . Since the testator had his domicile in Rhode Island, and the land devised is situate in that state, it follows that the *validity* of the devise which is here brought in question is to be determined by the law of the state of Rhode Island." (66 Fed. 808, 809).

Again we have the same situation as our first and second claims for relief.

Gaines v. Chew clearly shows that Judge Mathes also was correct when he held that he had jurisdiction over what is now the third claim for relief. Plaintiff's bill alleged the following: Clark had executed two wills. One

of these was executed in 1811, and the other in 1813. In the earlier will, Clark left all of his estate to his mother, and in the later will he left all of his estate to his daughter. Upon the death of Clark, the executors suppressed the will of 1813, and probated the earlier will in the Louisiana Probate Court. The bill in the federal Court asked that effect be given to the will of 1813 and that the probated will of 1811 be revoked, and that the defendants be required to account (43 U.S. 627; 11 L. Ed. 405).

On appeal, the Supreme Court first held that the federal Court could not exercise jurisdiction to revoke the probate of one will and to probate another. This was because the power to do so was vested exclusively in the state Probate Court. However, the Court held that because of the fraud committed, it had jurisdiction to grant relief by declaring the executors to be trustees for the benefit of plaintiffs with respect to any property which belonged to the Clark estate (43 U.S. 644-650; 11 L.Ed. 412-416). This is exactly the same as the relief sought in our third claim.

The following excerpt from the opinion outlines the reasoning underlying the Supreme Court's decision:

> In prosecuting their right as heirs at law by the complainants, *no probate of the will of 1813 will be required.* The complainants must rest upon the heirship of said Myra, the fraud charged against the executors, *in setting up and proving the will of 1811,* and notice of such fraud by the purchasers. In this form of proceeding the will of 1811 is brought before the court collaterally. *It is not an action of nullity, but a proceeding which may enable* the court *to give the proper*

relief, without decreeing the revocation of the will. (43 U.S. 647; 11 L. Ed. 413)[19]

Blacker v. Thatcher, is a fairly recent decision of this Court in which three highly regarded jurists participated. Judge Healy wrote the opinion and former Chief Judges Denman and Stephens concurred. This case and *Richardson v. Green,* supra and infra, are the only decisions in this Circuit which directly bear on the problem presented here. We therefore feel justified in giving unusually elaborate consideration to the *Blacker* case.

The plaintiff was a citizen of Oregon and the heir at law of a Montana testator. The defendants, citizens of Montana, were respectively the executor and a legatee named in the will. The will had been admitted to probate in the Montana Probate Court and the estate was in the process of being administered therein. The plaintiff's complaint alleged that the legatee was not an heir of the testator and that the testator had died intestate as to the residue of his estate. The complaint also alleged that there was a controversy between plaintiff and defendants as to the construction of the will. The defendants in their answer moved to dismiss on the ground that under Montana law, jurisdiction of such a controversy resided exclusively in the Courts of the State of Montana. The District Court ruled that it had jurisdiction over the controversy and that the decedent had died intestate with respect to the residue of his estate (145 F.2d 256).

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[19]The point was considered in *Markham v. Allen,* supra. There this Court was *reversed* by the Supreme Court for holding that the District Court had no jurisdiction.

After reciting the facts above summarized, this Court held that the laws of Montana like those of most of the states, "including practically all of those in the West . . .[20] provide a comprehensive system of probate." Judge Healy points out that where there is a will, proceedings start with the petition for probate and terminate with the decree of final distribution and that decree is conclusive. In Montana, says the Court, the probate proceeding embraces "the contest of wills and necessarily it comprehends the interpretation of the latter. The proceeding is in the nature of a proceeding in rem" (pp. 256-7). The Court goes on to say that under such circumstances the acceptance of jurisdiction by the Federal Court seems to interfere with the spirit of comity between Courts of independent and coordinate jurisdictions. In fact, says the Court both in the body of the opinion and by footnote, in states which have comprehensive systems of probate, such as Montana, proceedings to construe a will are generally held in Probate Courts and not in the exercise of general equity jurisdiction. But says the footnote, quoting from Pomeroy's Equity Jurisprudence, 5th Edition (1941) Secs. 346-352, this limited jurisdiction; i.e., jurisdiction in equity and not in probate, is exercised "only for the purpose of granting remedies which will serve to aid or remove obstacles from a pending administration." It is exercised "to construe doubtful provisions of a will and to direct executors with respect to

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[20]In our discussion of the fraud and undue influence claims, we will establish that the comprehensive system of probate found in Montana is also the system used in every state in this Circuit (prior to the admission of Alaska to statehood) *except Oregon.* Hence, *Richardson v. Green.*

their duties when a trust is created by it, but there is no special equitable jurisdiction to interpret a will . . . which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations . . .'' (145 F.2d 257).

Judge Healy apparently approached the *Blacker* case very much as Judge Mathes approached this case. Judge Healy confessed his hesitancy in holding that a federal Court could take jurisdiction in what is essentially a probate matter. However, in contrast to the learned trial Judge, he held that he was bound by the decisions of the United States Supreme Court, and acted accordingly. He said that irrespective of a disinclination of the lower federal Courts to interfere in any phase of a probate proceeding ''the Supreme Court has adhered to a different concept'' (p. 257). He quotes at length from *Waterman v. Canal-Louisiana Bank Co.,* 215 U.S. 33, 54 L. Ed. 80 (1909). We will not further enlarge this brief by a complete quotation, but we do think that the last sentence in the *Waterman* case as quoted by Judge Healy deserves a place in this argument. We quote as follows:

> This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them. (145 F. 2d 258)

The opinion then says, as we have consistently admitted, that the federal Courts cannot ''seize or control property in the possession of the State court.'' Also, as we have conceded, ''In states where the probate proceeding is

purely one in rem and not a suit inter partes, sustainable in a court of equity, they cannot entertain jurisdiction over a bill to set aside the probate of a will."

However, says the opinion,

> the Supreme Court "appears broadly to have insisted upon the proposition that jurisdiction" in diversity cases "cannot be impaired by state laws prescribing the modes of redress in their courts or regulating the distribution of their judicial power." (Citing cases) (145 F. 2d 258)

Then quoting from *Gaines v. Fuentes,* 92 U.S. 10, 22, 23 L. Ed. 524 (1875), the Court said:

> . . . whenever a controversy in a suit between parties arises "respecting *the validity or construction* of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." (Id.)

The next quotation is from *Byers v. McAuley,* 149 U.S. 620, 37 L. Ed. 867 (1892). This reads:

> . . . where no adjudication has as yet been made as to who are distributees of an estate in process of administration, the federal court is entitled to "entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate." *The pertinent decisions of the Court leave no room for the belief that the federal courts, on principles of comity, have any discretion to exercise in respect of the entertainment of suits of this nature.* (Id.)

The italicized sentence would seem to dispose of the District Judge's view that he had any discretion to exer-

cise when he determined whether he would or would not retain jurisdiction.

Finally, this Court in the *Blacker* opinion completely disposes of Judge Mathes' apparent suggestion that the Oregon State Court may not follow the judgment of the Federal Court in order to avoid "justice by halves." It says:

> But the presumption has been indulged that probate courts will respect adjudications made in settling the rights of parties in suits in the courts of the United States. *(Waterman v. Canal-Louisiana Bank Co.,* supra, 215 U.S. page 46, 30 S. Ct. 13, 54 L. Ed. 80.) It is there said that "a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected" in the Supreme Court. (p. 258)

Thus, it appears that this Court has clearly and definitely held that the first, second and third claims of the amended complaint, whether they involve validity, construction, or interpretation, are within the jurisdiction of the federal Court. We conclude that appellant's first three claims for relief (and the subsidiary sixth claim) are within the equitable jurisdiction of the United States Courts.

(2) Irrespective of the Federal Court's Jurisdiction Over the Fourth and Fifth Claims, the Dismissal of the First, Second and Third Claims Violated Rules 8(e) and 18(a) of the Federal Rules of Civil Procedure.

(Specifications of Error 1, 2.)

The District Judge has characterized these claims as "separate claims or causes of action." (R. 27). This

statement is obviously sound. Under the authority of rules 8(e) and 18(a) appellant joined his three equitable claims with the fourth and fifth (fraud and undue influence) claims over which the District Judge decided that he had no jurisdiction. Having established that, our first three claims are cognizable in the federal Court and that there is jurisdiction of the sixth claim if there is jurisdiction of any of the other claims, it must now be determined whether the joinder of other claims over which the Court *may* not have jurisdiction prejudices the right of a non-resident litigant to press his equitable rights in the United States Court. Or to put the question in another way: Is appellant forced to dismiss claims which he thinks are properly presented to the federal Court (whether he is right or wrong), in order to maintain his position in the Court which the Constitution and the statutes provide as a proper forum? We submit that this cannot be so, despite the decision of the District Judge to the contrary. At worst, the joinder of the claims based on fraud and undue influence constitutes a misjoinder of causes of action. Under rules 8(e) and 18(a), as interpreted by the Courts, a litigant may so misjoin without having the entire action dismissed. These rules are mere reaffirmations of earlier rules established by Court rule and judicial decision. Former Equity Rule 26 provided in part:

> The plaintiff may join in one bill as many causes of action cognizable in equity, as he may have against the defendant.

In *Gaines v. Chew*, supra, plaintiff joined a cause of action to revoke probate of a fraudulent will with a cause of action to require the executors to account. This

was a misjoinder, because the Louisiana probate Court had exclusive jurisdiction of the cause of action to revoke probate. The Supreme Court, however, instead of ruling that the suit should be dismissed, declared that while the Circuit Court could not revoke probate of the will, because jurisdiction so to do was vested exclusively in the state probate Court, it could grant the relief which was within its power to bestow, to-wit: an adjudication that the executors were constructive trustees of the estate for the benefit of plaintiffs.

Waterman v. Canal-Louisiana Bank & Trust Co., supra, is perhaps even more persuasive than *Gaines v. Chew.* In *Waterman,* the plaintiff sought the following judgment:

(1) That a legacy to an institution lapsed because of uncertainty or non-existence of the legatee.

(2) That heirs at law had abandoned any interest in the lapsed legacy.

(3) That the plaintiff, as sole heir at law capable of inheriting, was the only person entitled to the lapsed legacy.

(4) That another institution named in the will was not charitable and therefore not entitled to distribution.

(5) For an accounting from the executors (215 U. S. 41-43, 54 L. Ed. 83-84).

The defendants argued that the Federal Court had no jurisdiction. The Circuit Court of Appeals ordered that the action be dismissed, and the Supreme Court reversed. These are some of the material parts of the Supreme Court's decision:

> The United States circuit court, by granting this relief, *need not interfere with the ordinary settlement of the estate,* the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to, determine as between the parties before the court, the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. *The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court. . . .*
>
> The circuit court in this case construed the bill, in view of its broad prayer for relief, *as one which undertook to take the entire settlement of the estate from the hands of the probate court,* and denied the jurisdiction of the circuit court of the United States in the premises. We are of opinion that to the extent stated, the bill set up a valid ground for relief; *and, while all that it asks cannot be granted,* enough was stated in it to make a case with the jurisdiction of the Federal Courts within the principles we have stated. (215 U. S. 46-47, 54 L. Ed. 85.)

Here the District Court dismissed all claims, including those over which it had jurisdiction. It thus failed to follow the ordinary procedure in the United States equity courts. It also violated Rules 8(e) and 18(a). These rules read as follows:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. *When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made*

> *insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both . . .* (Rule 8(e)(2).)
>
> The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim *may* join either as *independent* or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. (Rule 18 (a).)

These rules not only authorize joinder; they forbid any such drastic penalty as the dismissal of the action, because of misjoinder. They say that the course which the District Court should have pursued (if it was correct as to the claims based on fraud and undue influence) was to retain jurisdiction over all the claims, except the fourth and fifth.

This statement is clearly supported by *Hanna v. Brictson Mfg. Co.,* 62 F.2d 139 (8th Cir. 1933). There, a cause of action to vacate an adjudication of bankruptcy was joined with a cause of action to vacate an equity decree. Defendants moved to dismiss the action upon the ground, among others, that a court of equity had no jurisdiction in bankruptcy, just as Judge Mathes held that a court of equity had no jurisdiction in probate. The District Court dismissed the action, just as Judge Mathes dismissed this action. On appeal, the Circuit Court held that the District Court had no jurisdiction in bankruptcy. The Circuit Court of Appeals reversed the judgment dismissing the action, holding that the District Court should have

retained jurisdiction of the action to vacate the equity decree. The Court said:

> Our conclusion is that a cause of action to vacate an adjudication in bankruptcy may not be joined with a cause of action to vacate an equity decree.
>
> It does not follow, however, that the court below was justified in dismissing the entire bill of complaint.
>
> Equity rule 26 (28 USCA Sec. 723) provides: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant . . . If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."
>
> Thus Rule 26 itself impliedly directs a court of equity to dispose of any cause of action stated in the bill which can properly be disposed of . . . *if two causes of action are joined, of only one of which the court has jurisdiction, it may not dismiss both, but may only dismiss the one that it has no jurisdiction to try* . . .
>
> The rule itself prohibits the joining of any causes of action unless "cognizable in equity."
>
> That the proper course to be followed where a cause of action in equity as to which the court has jurisdiction is joined with a cause of action over which it has no jurisdiction is to dismiss *only* the latter cause of action is indicated, not only by the equity rule itself, but by the following cases: (Citing nine cases) (p. 147).

The rule is mandatory; there was no room for the exercise of discretion.

In the cases cited by the Court in the *Brictson* case, one or more of the causes of action arose under the pat-

ent laws, and the Courts had jurisdiction by reason of patent law, not by reason of the diversity of citizenship. These causes were joined in the suits with other claims over which the Courts did not have jurisdiction, and this resulted in a misjoinder of causes. Despite this misjoinder, it was held that while the Court was compelled to dismiss the cases over which it had no jurisdiction, it was, nevertheless, required to retain and adjudicate those over which it had jurisdiction. These cases all show that there are circumstances under which the equity rule, authorizing and encouraging joinder of causes has to be subordinated to the statute delineating the jurisdiction of the United States Courts.

The simplest approach applied to patent cases is found in *Mecky v. Grabowski,* 177 Fed. 591 (C. C. E. D. Pa. 1910). There a count for patent infringement was joined with a count for unfair competition. Both arose in connection with the same patented article. The Circuit Judge held that the unfair competition count was not within his jurisdiction because there was no diversity of citizenship. He held that the patent count was within his jurisdiction because it involved Federal patent laws. He adopted the simple process of sustaining a demurrer to the unfair competition count and retaining the patent count.

The best discussion of the principle of these cases which we have found, is in *Geneva Furniture Mfg. Co. v. Karpen,* 238 U. S. 254, 59 L. Ed. 1295 (1915). There the complaint included several causes of action, some arising under patent laws and others by reason of breaches of contract. One of the defendants was a corporation which did not reside in the judicial district wherein the action

was brought. It therefore could not be sued for breach of contract in that district without its consent. It could be sued there for patent violations. The Supreme Court held:

> . . .; and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. *Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute.* Thus, the West Virginia company's objection, *while not good as to the entire bill, was good as to the causes of action not arising under the patent laws.* (238 U.S. 259-260; 59 L. Ed. 1297.)

Thus it clearly appears that even assuming that the fraud and undue influence claims do not belong in the Federal Court, nevertheless, there was no possible justification for the District Court dismissing the other counts. These, according to the District Judge himself, and according to all of the applicable authority which we have been able to find, were plainly and clearly within the jurisdiction of the Federal Courts and should remain there.

(3) The District Court Was Led Into Error by Mistakenly Assuming That the Attacks Upon the Trust Were Premature and by Misunderstanding the Nature and Effect of Equity's Disinclination to Do Justice by Halves.

(Specifications of Error 2, 3.)

A judge as able as the District Judge who decided this case is not easily led into what appears to be an

obvious misunderstanding of applicable principles of procedural law. There may be an explanation. In the first place, it should be noted that in the briefs which were written on the motion to dismiss the original complaint, neither side of this case argued the point of dismissal of the entire case in any detail. Appellees merely moved to dismiss the whole case because it was in essence a will contest. Appellant did argue that the attacks upon the trust provisions on grounds other than fraud and undue influence did not constitute a contest "in the customary acceptation of that phrase." (E.g. *Spencer v. Watkins,* 169 Fed. 379, supra.) Frankly, it did not occur to us that Judge Mathes would dismiss the entire case. Thus, his decision on the original complaint was, in a large measure, based upon an opinion reached without the aid of counsel.

The error in dismissing the whole case was elaborately argued in the brief in support of the First Amended Complaint. However, the judge was content to say that "The First Amended Complaint presents in substance nothing more than a re-arrangement of the claims asserted in the original Complaint." (R. 112.) On this ground and apparently without further consideration of the error in dismissing the complaint as a whole, the judgment was given.

We have already stated and disposed of the District Court's idea that plaintiff's causes of action are alternative. Actually, each one (other than sixth) is a separate basis for a judgment that the trust is invalid. Each one of the first five is effective without regard to the others. After the District Judge erroneously characterizes

the several claims as alternative, he sums up his holding that our present first and second claims should be dismissed in the following language:

> Until validity of the testamentary trust provisions has been finally adjudicated in the Probate Court of Oregon (O.R.S. 115.180), this court "could not do justice completely", and instead would be compelled to do justice "by halves", which, in equity, it will not do (R. 51).

This is a statement that until the fraud and undue influence claims are decided in the State Court, the other claims are premature. They are not premature, because they ask the Federal Court to tell the State Court that the trust provisions are void as a matter of law. Should they succeed, the State Court, while still administering the estate in the pending proceeding, will be compelled to distribute the residue disposed of in Article VI, to the sole heir at law because of intestacy. Wherein is this process premature?

Perhaps the best way to show what is and what is not premature is to refer to the cases which Judge Mathes cites to support his ruling. We have already discussed three of these cases, viz. *Waterman v. Canal-Louisiana Bank & Trust Co.,* supra; *Spencer v. Watkins,* supra, and *Wood v. Paine,* supra. None of these even touches upon the subject of prematurity.

The district Judge cites two cases which do discuss the subject of prematurity and which clearly demonstrate that the subject is not even material to the case at bar. One case is *Walker v. First Trust & Savings Bank,* 12 F. 2d 896 (8th Cir. 1926). There the bank was trustee

of a testamentary trust. It brought suit in the federal Court asking for instructions as to the method of handling trust funds. Among the instructions requested was an answer to the following question: "In the event of the death of . . . Brittain during the existence of the trust leaving issue, is the child of . . . Brittain entitled to receive the sum of $400.00 per month?" This is what the Court held:

> Brittain . . . is still living . . . about 51 years of age. One child of his . . . is also living. It is quite possible that other children may be born . . . during the existence of the trust. The question asked by the trustee is therefore *speculative,* and may involve the rights of persons not *in esse;* the instruction asked is not necessary for the present guidance of the trustee.
>
> As a general rule, a court of equity "will not undertake, *where there is no matter in dispute, to declare future rights,* nor will it ever undertake to decide upon and determine contingencies which may never arise. . . ." (p. 903.)

The other case cited on the subject of prematurity is *Gebhard v. Lenox Library,* 74 N.H. 416, 68 Atl. 540 (1907). In this case an executrix asked for construction of a will and for instructions concerning her duties. When the bill was filed there was pending and undetermined a petition for re-examination of the probate of the will which, if successful, would divest the executrix of title. The Court dismissed the bill upon the theory that there was no reason for the executrix to ask any questions until it was determined whether she had any rights whatsoever. The Court said:

> The court is therefore asked to construe the provisions of a document purporting to dispose of the property of the deceased while proceedings are pending which may show that its execution was invalid and that the plaintiff has no title to the estate as executrix and no trust duties to perform. It does not appear that the advice sought will be of use to the plaintiff in the discharge of official duties. In such a case the court will decline to comply with the request for instructions (pp. 540-541).

In this case, both proceedings were in the same state court.

Our case is the same as the "proceedings which are pending," as described in the *Gebhard* case. In our case all of the proceedings are in one action; the establishment of any one of the first five claims will result in invalidating Article VI and in disposing of the entire case. We do not have the situation of an attack on the will, so that a determination as to one clause (Article VI) is not premature. The amended complaint clearly says, "All other parts of said will are valid." (R. 71, 72, 73.) Since all claims are in the same action, none is premature. There is no reason to assume that the issue of fraud and undue influence should be tried before the issue of invalidity of the trust on other grounds. It would probably be more convenient to adopt the contrary procedure, i.e. to try legal issues before factual issues.

In short, every cause of action alleged in the amended complaint, other than the sixth, presents a presently existing justiciable controversy upon various separate and distinct grounds. We repeat, they are all of equal dignity. No one is dependent upon the other. A judgment adverse

to Appellant on any of the issues presented by any one of the claims is res judicata on that subject. The fundamental error in the decision is that the District Judge decided that two forms of attack on the trust (fraud and undue influence) must be pursued in advance of the attack upon other grounds. We cannot find any basis for this view.

The second error which resulted in the dismissal of the admittedly proper claims was the District Judge's application of the principle "A court of equity ought to do justice completely, and not by halves" (R. 50). Properly understood, this means that a court of equity will do justice as completely as it can. If one controversy is not within the jurisdiction of the Court because of lack of jurisdiction of parties or lack of jurisdiction of subject matter, it is impossible to do justice completely. This does not mean that the case may be dismissed, although the opinion of the District Judge seems to hold that he had discretion to do so.

We respectfully submit that the principle of full justice does not mean that a citizen of a foreign state, who is entitled to the protection of the federal Courts, is deprived of that protection because some phase of his case may be exclusively in the jurisdiction of the state Courts. It would certainly deprive appellant of his fundamental right to choose "as between different forums" (30 C.J.S. *Equity,* 419, supra).

In order to demonstrate the error, we will again explore the decisions upon which the District Judge relied. They are: *Camp v. Boyd,* 229 U.S. 530, 551, 57 L. Ed. 1317, 1327 (1913); *United States v. Union Pacific Railway,*

160 U.S. 1, 50, 51, 40 L. Ed. 319 (1895); *Waterman v. Canal-Louisiana Bank & Trust Co.,* supra; *Walker v. First Federal Trust & Savings Bank,* supra; *Spencer v. Watkins,* supra; *Wood v. Paine,* supra; *Gebhard v. Lenox Library,* supra.

We have already discussed the holdings in *Walker v. First Trust and Savings Bank, Spencer v. Watkins, Wood v. Paine* and *Gebhard v. Lenox Library* in this part of our brief. None of them have anything to do with the subject of equity *insisting* upon taking the whole case or none. In fact, none of them actually relies upon the principle of not doing justice "by halves." *Camp v. Boyd* and *United States v. Union Pacific Railway* both announce the principle and follow it because it presented no difficulty. In these cases, all of the controversies were properly within the jurisdiction of the Federal Court and were therefore brought into one case.

We have discussed *Waterman v. Canal-Louisiana Bank & Trust Co.* more than once. It is therefore unnecessary to go into great detail. Suffice it to say that in *Waterman* five separate and distinct judgments were asked. Some were outside of the jurisdiction of a Federal Court because they were peculiarly matters of probate, such as that part of the *Waterman* case which involved an accounting by the executors. Nevertheless the Supreme Court held that *all relief which was within federal jurisdiction should be granted by the Federal Court.* It did not order a dismissal of the entire case. In fact, it reversed a Circuit Court's decision dismissing the bill. It was not worried about doing justice by halves, because that rule is "not an inflexible one" (30 C.J.S. *Equity,* p. 419).

Another error which perhaps is chargeable to the failure of counsel to discuss the matter in their briefs was the District Judge's dismissal of what is now the third claim for relief. This is concerned with an alleged undisclosed and later will or other document. It seeks judgment that the defendant trustees be held constructive trustees for appellant's benefit because of fraudulent suppression. This is the remedy allowed in *Gaines v. Chew,* supra. The District Judge himself held that this cause was within the jurisdiction of a federal Court of equity (R. 48). Why then did the District Judge dismiss the claim?

Because, he says, "A claim to have declared a constructive trust . . . is not the main purpose of this action but merely an incidental aspect of the whole controversy . . . and a subsidiary claim of fraud upon the probate court of Oregon" (R. 52). With the utmost deference to the District Judge this is clear *ipse dixit.* Just why it is "incidental" or "subsidiary" we are not told because it is neither one or the other. It is based upon facts entirely different from the facts stated elsewhere. It is based upon the fraudulent suppressing of a later document and seeks entirely different relief, viz: a declaration of the existence of a trust based upon that fraud.

Again it is necessary for us to analyze the cases cited by the Judge in support of this alleged "incidental aspect" and "subsidiary claim." The cases are: *Ellis v. Davis,* 109 U.S. 485, 27 L. Ed. 1006 (1883); *Haynes v. Carpenter,* 91 U.S. 254, 23 L. Ed. 345 (1876); and *Broderick's Will (Kieley v. McGlynn),* 88 U.S. 503, 22 L. Ed. 599 (1875).

Ellis v. Davis was an action by heirs against an executor for an accounting; to revoke the probate of a will upon the grounds of unsoundness of mind and undue influence, and to set aside a sale of property from the decedent to the defendant. At the time of this decision the distinction between equity and law was strictly maintained. As to that part of the bill in equity which was concerned with possession of the real property and the accounting it was held there was an adequate remedy at law so that these causes of action would not be entertained in equity. As to the attempt to invalidate the will and annul its probate, it was held that federal Courts of equity do not administer relief in such cases.[21] As to the fraud in the sale of the property the Court held that the allegations were insufficient to allege fraud. For these reasons it was held that the demurrer was "rightly sustained."

In *Haynes v. Carpenter,* supra, the object of the suit was "to enjoin and stop litigation in the state courts and to bring all litigation before the Circuit Court." By virtue of the federal statute prohibiting federal Courts from granting injunctions to stay proceedings in a state Court (Act of March 2, 1792, 1 Stat. at L. 335) the Supreme Court held that there was no basis for the action.

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[21]The case recognizes that where the laws of the state provide "for trying the question of the validity of a will already admitted to probate by a litigation between parties, . . . it may be that the courts of the United States have jurisdiction." (109 U.S. 496; 27 L. Ed. 1009.) This is material to the fourth and fifth claims.

In the famous case of *Broderick's Will,* the Supreme Court held that in California,[22] where there are elaborate provisions for the admission of wills to probate after due notice and for contest thereof under special probate procedure providing for special notice, the federal Courts will not take jurisdiction of an action to revoke the probate of a will. The Court applied this principle to an attempt via a suit in equity to revoke probate of an alleged forged will, which had been admitted to probate. The Court took pains to point out that the California procedure did not permit such an action inter partes.

We confess our inability to perceive the authority of these cases to support the view that an action brought pursuant to the rule of *Gaines v. Chew* is incidental or subsidiary. It was not held subsidiary or incidental by the Supreme Court in *Gaines*—nor in any case, so far as we are advised.

So much for the District Court's error in dismissing the whole case, because he denied jurisdiction of the attack on Article VI on the ground of fraud and undue influence. We will now present our arguments to support the proposition that the Court had jurisdiction of these claims.

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[22]The difference between California and Oregon is best brought out in *Richardson v. Green,* supra and infra, and *Carrau v. O'Calligan,* 125 Fed. 657 (9th Cir. 1903), and decision affirming the *Carrau* case *sub. nom. O'Callaghan v. O'Brien,* 199 U.S. 89, 50 L. Ed. 101 (1905), infra.

(B) THE ATTACK UPON ARTICLE VI OF THE WILL AS AMENDED BY THE CODICILS UPON THE GROUNDS OF FRAUD AND UNDUE INFLUENCE ARE PROCEEDINGS IN PERSONAM UNDER THE LAW OF OREGON. THEREFORE, THE FEDERAL COURT HAS JURISDICTION OF SUCH PROCEEDINGS.

(Specifications of Error 4, 5, 6.)

(1) **A Federal Court Action Contesting the Validity of Article VI on Grounds of Fraud and Undue Influence Does Not Divest or Interfere With the State Court's Jurisdiction of the Res.**

(Specification of Error 4.)

Administration of an estate necessarily involves control of the assets of the estate for the purpose of conserving them for the benefit of creditors, legatees, and heirs and for other numerous purposes which are elementary to the practicing lawyer. It is generally said that a probate proceeding is in rem, i.e., a proceeding which takes control of a res and by appropriate proceedings binds the entire world as to the property in its possession. Therefore, any interference with that possession and that administration would frustrate the purposes of the ordinary probate system. The result is that state probate courts have almost invariably been held to have exclusive jurisdiction of the possession of the property of the estate and the administration of that property. It must be apparent that in this case, no effort is made to divest the state probate court of its complete control of the estate and its administration. The sole purpose is to require the parties who are before the Court to have the estate distributed in accordance with the Federal Court's final judgment as to the course which such distribution should take.

Throughout the earlier parts of this brief we have attempted to make clear to this Court that there is no suggestion of taking control of the property or its administration from the Oregon Probate Court. In fact, it would be impossible to do so, no matter what judgment should be entered in this case. If any one of our claims for relief should be sustained, it will only mean that the executors, the trustees and the Oregon Probate Court will be bound by the judgment of a federal Court to the effect that Article VI is void in whole or in part, as the case may be. This, of course, will result in intestacy as to that part of the estate. Will intestacy take the estate or its administration from the Probate Court? Certainly not. The Probate Court will then be required to determine the identity of the heirs at law and to distribute accordingly. Here the identity of the sole heir is unmistakably established.

In support of the foregoing, we cite the following cases: *Byers v. McAuley,* supra, 149 U.S. 608, 617, 37 L. Ed. 867, 872 (1892); *Waterman v. Canal-Louisiana Bank & Trust Co.,* supra, 215 U.S. 46, 54 L. Ed. 80, 85, and *Spencer v. Watkins,* supra, 169 Fed. 383. In *Spencer v. Watkins,* where the purpose of the action was to void a testamentary charitable trust, the Circuit Court of Appeals said:

> It should be added that in purpose and effect *it no more interfered with the probate court in its rightful custody of the estate* than would an ordinary action and judgment at law in the Circuit Court establishing a claim or demand on contract. (p. 383)

(2) If the State Law Permits a Proceeding Inter Partes and In Personam—Even in a Probate Court—to Establish the Invalidity of Article VI Upon the Grounds of Fraud and Undue Influence, Then the Federal Court Will Take Jurisdiction of Such Action.

(Specification of Error 4.)

We have already seen that the federal Courts will take jurisdiction of actions to avoid wills or parts thereof upon the ground that they were procured by fraud, such as the suppression of a subsequent will *(Gaines v. Chew,* supra). We have seen that the federal Courts will entertain actions to interpret or construe wills, or parts thereof, and even to invalidate a will or any of its provisions, if either offends against rules against perpetuities *(Blacker v. Thatcher,* supra; *Wood v. Paine,* supra; *Spencer v. Watkins,* supra). Certainly it is now settled that a federal Court will take jurisdiction of an action to determine the identity of the person to whom an estate, or part thereof, should be distributed (*Markham v. Allen,* supra; *Waterman v. Canal-Louisiana Bank & Trust Co.,* supra; *Byers v. McAuley,* supra).

Since the principles and the authorities are well stated and documented in the opinion of Judge Mathes, we quote a part of his opinion at length:

> If then a right involving a decedent's estate is such as would have been enforceable in the English Court of Chancery in 1789, and is such as would be enforceable *in an action in personam in some court—even a probate court—of the State, a suit to enforce that right may be maintained in a federal court of equity as an action in personam, if diversity of citizenship and the requisite jurisdictional amount exist. (Markham v. Allen, supra,* 326 U.S. at 494;

Waterman v. Canal-Louisiana Bank & Trust Co., supra, 215 U.S. at 43; *Payne v. Hook, supra,* 74 U.S. (7 Wall.) at 430; *id.* 81 U.S. (14 Wall.) 252 (1871).) On the other hand, if a right involving a decedent's estate is by state law made enforceable in an action in personam in a State court—rather than solely in rem in probate proceedings, a diversity suit to enforce the right in the federal courts is a "civil action" within 28 U.S.C. Sec. 1332.

This was the ground upon which jurisdiction was sustained in *Broderick's Will, supra,* where the Court said: "Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit (District) Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit (District) Courts, as well as by the courts of the State." (88 U.S. (21 Wall.) at 520.)

So it is that "where a State, by statute or custom, gives to parties interested the right to bring an action . . . to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but . . . this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate. . . ." (*Sutton v. English, supra,* 246 U.S. at 205.)

State-created means for the enforcement of a right involving a decedent's estate by a plenary suit or action in personam, rather than in rem in probate proceedings, will be recognized in the federal courts in diversity cases, regardless of whether the state-created means be denominated a state-created right or a state-created remedy. *(Sutton v. English, supra,*

246 U.S. at 205; *Farrell v. O'Brien, supra,* 199 U.S. at 110; *Ellis v. Davis, supra,* 109 U.S. at 494-97; *Broderick's Will, supra,* 88 U.S. (21 Wall.) at 519-20; *Looney v. Capital Natl. Bank, supra,* 235 F.2d at 438; *McClendon v. Straub,* 193 F.2d 596 (5th Cir. 1952); *Sawyer v. White,* 122 Fed. 223, 227 (8th Cir. 1903); *Williams v. Crabb,* 117 Fed. 193 (7th Cir.), *cert. denied,* 187 U.S. 645 (1902); *McCan v. First Nat. Bank,* 139 F.Supp. 224 (D.Ore. 1954), *aff'd,* 229 F.2d 859 (9th Cir. 1956); *accord: Gaines v. Fuentes, supra,* 92 U.S. at 21; *Richardson v. Green,* 61 Fed. 432 (9th Cir.), *cert. denied,* 159 U.S. 264 (1894); *cf: Pusey & Jones Co. v. Hanssen,* 261 U.S. 491, 497-98 (1923).) (R. 36-38).

To these authorities we might add the dictum in *Ellis v. Davis,* already quoted. Again, there is a dictum of this Court in *Carrau v. O'Calligan,* 125 Fed. 657 (1903). There Judge Ross (Judges Gilbert and Morrow concurring) said:

> But wherever, by the law obtaining in a state, customary or statutory, suits in equity may be maintained in the courts of such state to set aside the probate of a will, similar suits may be maintained by original process in a federal court, where the requisite diverse citizenship and other requisite conditions exist. (p. 663)

We are led to wonder why there is any distinction between an attack upon a clause in a will which is inserted therein by fraud or undue influence and an attack based upon another type of fraud. Why is there a distinction between the fraud and undue influence claims and the claim of invalidity of Article VI by its very terms? The only possible reason for such a distinction is that in some

jurisdictions *(not Oregon),* an attack upon a will is made part of the probate system by legislative fiat. It so happens that Oregon has no statute to that effect and no probate system of which such statute could be a part. This will be developed later in our brief. At this point, we respectfully submit that if Oregon permits a proceeding inter partes in personam in any Court—probate or otherwise—then the Federal Court will take jurisdiction of the same type of case, given the requisite diversity and amount.

(3) Under the Law of Oregon an Attack on a Will Is a Proceeding In Personam and Inter Partes.
(Specification of Error 4.)

The entire basis for the decision of the District Court is that the portion of the complaint and amended complaint which attacks Article VI on the ground of fraud and undue influence is a proceeding in rem and an integral part of the probate proceeding in the Oregon Probate Court. As we have seen, the test of this holding is whether the District Court's concept of the Oregon law is correct or whether, under the law of Oregon, such an attack on a will is a proceeding in personam and inter partes.

We have attached to this brief as an appendix all of the provisions of the Oregon law which are material to the solution of our problem. Chapter 114, Volume I, of *Oregon Revised Statutes,* contains provisions as to the execution of wills and their construction. Chapter 115 is concerned with probate and administration. Section 115.110 provides:

> Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.[23]

Oregon's only statutory requirements as to making wills is that the testator must be 21 years of age, or more, and of sound mind, and that the will must be attested by qualified witnesses (Secs. 114.020-114.040). None of these provisions is involved in our case. Soundness of mind and due execution are affirmatively alleged in the amended complaint (R. 56, 59, 62, 70, 71, 72).

After establishing the venue of the probate of the will, the first provision for seeking its admission to probate is Section 115.170. It is there said:

> Upon hearing of a petition for the probate of a will *ex parte and before contest is filed,* an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court.

There follow provisions for affidavits of witnesses outside of the jurisdiction and the production of witnesses in court upon motion of an interested party. It then says:

> However, in case of contest of a will or the probate thereof in solemn form, the proof of any and all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in *a suit in equity.*

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[23]This is a codification of Section 1 of Laws of Oregon, 1893, pp. 31-32. This Act will be discussed later.

The next section, 150.180, reads:

> When a will has been admitted to probate, any person interested may at any time within 6 months after . . . the order of court admitting such will to probate contest the same or the validity of such will.[24]

Section 115.180, as thus quoted, *is the only provision of the statutory law of Oregon for the contest of a will.*

There is no statement of the grounds of contest and *no judicial procedure is provided for the prosecution of a contest.* There is no provision for citing or summoning the parties interested in the will to plead to the contest. So far as we are advised, that is all the law relating to contests.

By judicial legislation and with obvious justification, the failure of a will to conform to the requirements of Chapter 114 (mental competency and proper attestation) have been customarily accepted as grounds for contest. (*Hubbard v. Hubbard,* 7 Or. 42 (1879); *In Re Mendenhall's Will,* 43 Or. 542, 73 Pac. 1033 (1903); *Johnson v. Helmer,* 100 Or. 142, 196 Pac. 385 (1921).)

There are also cases which accept jurisdiction of contests of wills on grounds of undue influence or invalidity because of violation of the rule against perpetuities. (*Hubbard v. Hubbard,* supra; *Johnson v. Helmer,* supra; *In Re Sturtevant's Estate,* 92 Or. 269, 178 Pac. 192 (1919); *Leadbetter v. Price,* 102 Or. 159, 199 Pac. 633 (1921).)

The Oregon Courts have fixed jurisdiction of contests in the Court in which the will is probated. (*Greenwood*

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[24]This is Section 4 of the 1893 Statute mentioned in footnote 23.

v. Cline, 7 Or. 17 (1879); *Clark's Heirs v. Ellis,* 9 Or. 128 (1881); *Luper v. Werts,* 19 Or. 122, 23 Pac. 850 (1890).) No statute says this, but it was certainly convenient to select the most convenient Court.

Failing any statutory procedure for will contests as such, the Oregon statutes do provide a procedure under the general probate statute (115.010). This statute reads as follows:

> No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction *is in the nature of a suit in equity* as distinguished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:
>
> (1) A *citation* to a party.
>
> (2) A verified *petition* of a party in interest.
>
> (3) A subpena to a witness.
>
> (4) Orders and decrees.
>
> (5) An execution or warrant to enforce its orders and decrees.[25]

Since the mode of procedure in the exercise of jurisdiction in the Oregon Probate Courts is in the nature of a suit in equity, it is only natural that all proceedings

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[25]This statute is in substantially the same form as has been the law in Oregon since June 1, 1862. See Oregon Revised Statutes Annotations to Section 115.010, p. 834.

therein, including the will contest, should be initiated by a petition.[26]

> A suit on the *equity side* of the Court of Chancery on behalf of a subject is ordinarily commenced by preferring a *petition* . . . This petition . . . is called in the old books An English Bill . . . (Daniell's Chancery Pleading & Practice, Vol. 1, p. 2. (6 Am. Ed.) 1894.)

Since the Oregon Probate Courts proceed as in a suit in equity, it is also entirely proper that its process should be a *citation.* A citation, it is said, "is usually the original process in any proceeding and is in all respects analogous to . . . the subpoena *in chancery.*" (Cyclopedic Law Dictionary, p. 151 (Calaghan and Company 1912).) A subpoena in chancery is what is called a summons under Federal laws (Cyclopedia of Federal Procedure (Third Edition), Vol. 3, Sec. 11.14, pp. 354-356). We cite from an opinion in a New Jersey case because, until recently, the Courts in that state, adhered closely to the traditional equity forms. In *Fraser v. Fraser,* 77 N. J. Eq. 205, 207, 75 Atl. 979 (1910), the court held:

> . . . a bill is in reality a petition by another name, and the only difference between a bill and a petition is that the latter is less formal in its averments and prayers and the defendant is brought in by process called a "citation," instead of by subpoena ad re-

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[26]This Court in its opinion in *Richardson v. Green,* supra, specially noted that in Oregon a will contest is initiated by filing a *petition,* and that in the petition, "the same facts are set forth as would be under the same circumstances in a bill in equity." This mode of procedure was one of the facts that convinced this Court that in Oregon a contest of will was an action inter partes (61 Fed. 427).

spondendum, and is required to answer in shorter time (p. 980).

It is hardly necessary to cite further authority to the effect that in equity a bill and a petition are the same and that a subpoena and a citation are the same.

Similarly, it is unnecessary to cite authority to the effect that equity acts in personam. We will content ourselves with a quotation from American Jurisprudence as follows:

> The maxim announcing the principle that equity acts *in personam,* not *in rem,* is regarded as basic to a discussion of equitable jurisdiction. From early times, an exercise of the Chancery court's power has been considered to depend on jurisdiction over the parties by reason of their presence and residence, and not on the jurisdiction over the situs of property in respect of which relief is sought, since obedience to decrees is compelled by attachment against the persons of parties.
>
> (19 *Am. Jur., Equity,* Sec. 23, p. 52.)

In 1949, the Oregon Legislature enacted a statute transferring jurisdiction of probate in Multnomah County from the County Court to the Circuit Court. We quote this statute because it again emphasizes that in Oregon probate jurisdiction of will contests is equity jurisdiction. The statute reads as follows:

> There also is conferred upon, and vested in, the circuit court of a judicial district described in ORS 3.310 full, complete, general and exclusive *jurisdiction, authority and power in equity,* in the first instance, in all matters whatever pertaining to a court of probate, including the construing of, and declara-

> tion of rights under, wills and codicils, and therein the determining of questions of title to real, personal, or mixed properties . . . (ORS 3.340).

ORS 3.310 refers to one county having a population of more than 300,000 persons. That county is Multnomah, wherein lies the City of Portland. The transfer of jurisdiction from the County Court to the Circuit Court did not change any then existing law. Section 3.350 says, "In any cause, matter or proceeding over which by existing laws the circuit court of a judicial district described in ORS 3.310 has jurisdiction, the procedure and practice shall be governed by the existing laws applicable to such cause, matter or proceeding without change." This was apparently the view of Judge Mathes (R. 43-44). However, he completely overlooked the fact that before 1949 proceedings in probate were in the nature of suits in equity; i.e., inter partes and in personam. The 1949 Statute restated this by specifically referring to "jurisdiction, authority and power in equity."

To recapitulate, full jurisdiction in equity is vested in all matters pertaining to a Court of probate (ORS 3.310). The procedure in probate is the procedure of a Court in equity (ORS 115.010). Questions of fact are proved in accordance with the practice in a suit in equity (115.170 (3)). This has been the law since Oregon became a state in the Union. It was not changed by the transfer of probate jurisdiction from County Courts to Circuit Courts in Multnomah County. In fact, it was reaffirmed. This having been established, the Federal Court will not permit itself to be divested of jurisdiction (*Waterman v. Canal-Louisiana Bank & Trust Co.,* supra; *Blacker v. Thatcher,* supra).

Before leaving this subject, it might be well to state the historical background of the Oregon law. In 1843, the citizens of what was then Oregon territory adopted by reference the law of Iowa as to judicial power and procedure, and specifically said that the laws of Iowa Territory "respecting wills and administrators shall be the law of this territory." (Act of July 5, 1843, Art. 14.) The law of Iowa Territory 1838-1839, page 471, said, *inter alia,* "That if any person interested shall, within five years after the probate of any such will, testament or codicil, in the court of probate as aforesaid, appear and by his *bill in chancery,* contest the validity of the same, an issue of law shall be made up whether the writing produced be the will of the testator or testatrix, or not." There has been no real change in the law of Oregon as to will contests since that time.

The District Judge's opinion seems to indicate that the Act of 1893 (Laws of Oregon 1893, pp. 31-32), mentioned above, made a change. Since that idea seems to have put a doubt in the Judge's mind as to the authority of *Richardson v. Green* (see infra), it is desirable to analyze the 1893 Act. This Act was in four sections. The first section provides for the delivery of a will by a custodian thereof. That is now 115.110 of the Revised Statutes. Section 2 provides for a petition by an executor, devisee or legatee to prove a will. That is now 115.120. Section 3 is now 115.130; it provides for the production of wills.[27]

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[27]In the 1893 Statute, there was a sentence which made it a contempt to refuse to produce a will in obedience to the Court's order. This was dropped from the revision of 115.130 because the same thing is provided for in 33.010(1)(e).

Section 4 of the Act says that a will may be contested and provides a time limitation of one year after admission to probate within which a contest may be filed, except in case of disability. This is now 115.180.[28]

In 1893 there were only two changes in the law and no more. One was to add to the law a provision to require custodians of wills to deliver them for record (Sections 1 and 3). A time limitation was added (Section 4). The provision for a contest was *not new.* The best way to prove this is to point out that if the legislature had attempted to make any changes in the law, other than the two mentioned, such enactment *would have been unconstitutional.*

Section 20 of Article 4 of the Oregon Constitution provides that the subjects of all acts "shall be expressed in the title . . ." "If any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." With this fundamental law in mind, let us examine the title of the 1893 Act:

> AN ACT to require custodians of wills to deliver the same for record and to provide the time within which the probate of wills may be contested.

Thus, if there were anything new other than delivery and time limitation, the new part would have been void.

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[28]There is a saving clause in the 1893 Act applicable to wills already admitted to probate at that time. This has been dropped because unnecessary. The one-year limitation has been changed to six months.

In order to prove the point that the law was changed, the District Judge says that the Oregon Courts have interpreted the 1893 legislation "as conferring exclusive jurisdiction over such will contests upon the probate courts as such, at that time solely the County Courts—and not upon the Oregon courts of general equitable jurisdiction, the Circuit Courts." (R. 47.) To support this statement, there is cited *Florey v. Meeker,* 194 Or. 257, 240 P.2d 1177, 1187 (1951). As we have pointed out repeatedly, it makes no difference what Court hears will contests, whether a Probate Court or a Circuit Court. We have never claimed that will contests must be tried in Courts of general jurisdiction. We claim and have proved that a will contest in Oregon is in personam.

However, it may not be amiss to look as *Florey v. Meeker.* There the Court held:

> Any issue relative to the sufficiency of the codicil's execution was properly determinable in the court of probate. (p. 1187.)

The 1893 Statute was not mentioned. The rule thus stated is and has been the Oregon law for almost a hundred years. If Judge Mathes meant to add anything to Oregon law by the words "as such" following "the probate court," we must respectfully dissent. A will contest in Oregon is a proceeding in personam in the statutory Court delegated to hear and decide the case.

We have read all of the Oregon authorities cited in the District Judge's opinion and in the comprehensive briefs of our learned adversaries. We have made our own independent research. We have not found one word in any decision of an Oregon Court which says or intimates

that a will contest is a proceeding in rem. Except as outlined above, there is not a word in the cases or in the statutes which tells us how a will contest is to be prosecuted. The statutes and cases are consistent on the subject of pleadings, process, evidence, and form. So we must ask what sort of legal proceeding is involved? Is it a proceeding in rem? Not under the Oregon law. We can best demonstrate this by contrasting Oregon law with the law of other states in this circuit. Our investigation should start with *Broderick's Will,* supra, 88 U.S. 503, 22 L. Ed. 599 (1875).

That case describes the California system. In general, the California system has been adopted in Arizona, Idaho, Montana, Nevada and Washington.[29] It will not be necessary for us to go much further than *Broderick* to describe the probate systems of all these states and their provisions for contest of wills.

According to Mr. Justice Bradley, the California law, as it stood in 1860, provided for the filing of a petition for the probate of a will. A day was appointed for proving the will and notice was published in a newspaper. Citations were issued to the heirs residing in the county, and to any executors named in the will and not joining in

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[29]Arizona Revised Statutes, Chapter 3, Sec. 14-301 - 14-376.
Idaho Code, Title 15, Chapter 1, Sec. 15-101 - 15-102; Chapter 2, Sec. 15-201 - 15-238.
Montana Revised Codes, Chapter 8, Sec. 91-801 - 91-811; Chapter 9, Sec. 91-901 - 91-907; Chapter 10, Sec. 91-1001 - 91-1003; Chapter 11, Sec. 91-1101 - 91-1107; Chapter 12, Sec. 91-1201 - 91-1207.
Nevada Revised Statutes, Chapter 136, Sec. 136.010 - 136.270; Chapter 137, Sec. 137.010 - 137.130.
Washington Revised Code, Chapter 11.20, Sec. 11.20.010 - 11.20.100; Chapter 11.24, Sec. 11.24.010 - 11.24.050.

the petition. On the return day "any person interested might appear and contest the will." Should there be minors or non-residents of the county interested, the Court was required to appoint an attorney to represent them. At the contest *before probate,* written grounds of opposition were filed, issues were formed, and the case was sent to a jury, unless a jury was waived. The grounds of such a petition were incompetency, restraint, undue influence, fraudulent representations, and any other cause affecting the validity of the will. Also, "various provisions were added, calculating to secure a thorough investigation on the merits." (88 U.S. 516, 22 L.Ed. 604.)

May we point out that all of the foregoing, which is provided for *prior* to the admission of the will to probate, is in marked contrast to the Oregon system of probate in common form without notice and *without the possibility of a contest.* The Supreme Court's opinion continues as follows:

> It was further provided, that when a will had been admitted to probate, any person interested might at any time within one year after such probate, contest the same or the validity of the will by filing in the same court a petition containing his allegations against its validity or the sufficiency of the proof, and praying that the probate might be revoked. Hereupon *new citations* were to be issued and a new trial had. But it was declared that if no person should within one year appear to contest the will or probate, the latter should be conclusive, saving to infants, married women, and persons of unsound mind, a like period of one year after disability removed. . . .
>
> In view of these provisions, it is difficult to conceive of a more complete and effective probate juris-

> diction, or one better calculated to attain the ends of justice and truth. (88 U.S. 516, 517, 22 L. Ed. 604)

The present California law is not very different. The notice provisions are perhaps somewhat more comprehensive; e.g., heirs, legatees and devisees must be served with written notice of the hearing of the petition for probate (Calif. Probate Code, Sec. 328). The contest provisions are substantially the same, except that now, when there is a contest before probate, citation must be issued to the heirs and to all persons interested in the will. When there is a contest after probate, the citation is issued to the executor, devisees, legatees, and heirs. Thus, the California system necessarily involves *notice and citation to all persons interested,* whereas Oregon is silent on the subject of the party or parties to whom citation must be directed when a will is under attack. The result is that a judgment in a will contest in Oregon is only conclusive upon the parties to the case. This is the only reasonable interpretation of ORS 43.130.

This section is concerned with the conclusiveness of judgments. It is there said in subdivision (1) that a judgment against a specific thing in respect to "the probate of a will or the administration of the estate of a deceased person or in respect to the personal, political or legal condition or relation of a particular person is conclusive . . ." Subdivision (2) says that in other cases the judgment is conclusive "between the parties and their representatives and successors." This means that the *original probate* of a will in common form (*ex parte* or without notice) is conclusive unless there is a contest.

This is what the Court decided in *Hubbard v. Hubbard,* 7 Or. 42 (1879) when it said:

> It is provided in this state that county courts shall be vested with the exclusive jurisdiction in the first instance to take proof of wills (Code Sec. 969). And their judgments and decrees are held to be conclusive in collateral proceedings, and in every other instance until they are vacated by proceedings on appeal, *or successfully impeached in some known and recognized legal method* (Jones v. Dove, 6 Or. 188 (1876) (p. 44).

This quotation from *Hubbard* is taken almost verbatim from *Jones v. Dove,* 6 Or. 191. The part quoted follows a statement in the *Jones* case, that "With us, the courts of common law and equity have no *original jurisdiction* or right to determine whether a will has been *legally executed or not.*" (pp. 190-191.) These early decisions are important, because they demonstrate that it is the unchanged law of Oregon that a will shall be admitted to probate *ex parte* and without notice; that only the probate court determines in the first instance whether the will so submitted has been legally executed; and that the decree admitting the will to probate is conclusive, unless "successfully impeached." They indicate that there is no way to attack a will until after it is admitted to probate.

In *Luper v. Werts,* 19 Or. 122, 23 Pac. 850 (1890):

> The formal probate having been made ex parte, is not considered of any importance when the validity of the will is attacked by a direct proceeding. The practice, however, in such cases, would be very much simplified if the *legislature* were to require the pro-

> bate court, when a petition for the probate of a will was filed, to issue a citation, to be served upon the parties interested in the estate, to show cause why the will should not be admitted to probate, and have any contest which might be made against it determined upon the return of the citation (p. 852).

The Legislature has not made such provision; neither have the Courts.

Because of the fundamental law of Oregon, as stated in the cases cited, it was held in the only case which has ever directly considered the point involved here *(Richardson v. Green)* that a will contest in Oregon was a direct attack in an action *inter partes* and *in personam.*

(4) The Only Case in Any Jurisdiction Which Has Decided the Question as to Whether a Will Contest in Oregon Is Inter Partes and In Personam or In Rem Is Richardson v. Green. That Case Holds That a Contest Is Inter Partes. It Is Still Law.

(Specifications of Error 5, 6.)

In *Richardson v. Green,* supra, certiorari was denied by the Supreme Court. The decision was approved by this Court in *Carrau v. O'Calligan,* supra, 125 Fed. 657 (1903). *Richardson v. Green* is so important to the result of this appeal that we are forced to discuss it at length. The case involved a diversity action to have a will declared invalid upon the ground that it was "false, forged and fraudulent." The defendants demurred upon the ground of lack of jurisdiction and their demurrer was overruled without an opinion on the subject of jurisdiction (61 Fed. 425). After plaintiffs prevailed in the trial Court, defendants appealed to this Court. The objection

to the jurisdiction of the Federal Court was apparently argued and briefed extensively. The Court held that the proceeding was inter partes and in personam, and therefore was within the jurisdiction of the Federal Court.

Judge Knowles attacked the question straight on. He asked, "Did the circuit court have jurisdiction of this cause, or was it within the exclusive jurisdiction of the county court of Multnomah County?" (61 Fed. 425.) The opinion points out, as we have, that the county court had exclusive jurisdiction in the first instance in matters pertaining to a Court of Probate.[30] Then says the Court, there is no definition of what is meant by Probate Courts and there is no common law definition. Therefore, the Court turned to *Hubbard v. Hubbard,* 7 Or. 42, supra, to ascertain the Oregon law. It quotes *Hubbard* to the effect that under the English practice there were two modes of proving a will of personal property, the "common form," which is propounded by the executor and proved ex parte, and the "solemn form" in which there is a citation to the next of kin and proof is taken by testimony, but that "in this state, probate in common form is the only one which appears to have been adopted by any positive enactment of the legislature." (61 Fed. 426.)

The next case cited is *Luper v. Werts,* 19 Or. 122-126, 23 Pac. 850, supra. As we have seen, *Luper* says that it would be better if the Legislature authorized "the probate court to issue a citation and permit a contest before probate." From *Hubbard* and *Luper,* the Court deduces that "there was no law in Oregon when this

[30]In cases arising in Multnomah County, transferred to the circuit court of that county sitting in probate by the Act of 1949.

action was commenced to warrant any contest upon the validity of a will at the time the same was being probated." This situation has never been changed.

In passing, the Court points out that, although in England probate in common form of a will devising real property is subject to collateral attack, this is not so in Oregon. In Oregon, a will is attacked by a "direct proceeding."[31] (61 Fed. 426.) The Court then analyzes the nature of the direct proceeding. It finds that the cases cited, which were will contests, were between *parties* and were not proceedings in rem. The Court points out that in a proceeding in rem the contest is against the validity of the will and that there are no parties in the sense that one is plaintiff and the other defendant.[32]

To demonstrate the proposition that there were parties to these will contests, the Court calls attention to *Clark's Heirs v. Ellis,* 9 Or. 133 (1881), which starts:

> This proceeding was originally commenced in the County Court of Union County by petition of respondents as heirs at law of William Clark, deceased, against the appellants, to set aside the will of said Clark and to revoke the probate thereof (61 Fed. 427).

The Court returns to *Luper v. Werts,* supra. Luper filed a petition in the county court to vacate the order admit-

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[31]Citing: *Jones v. Dove,* 6 Or. 188 (1876); *Hubbard v. Hubbard,* 7 Or. 42 (1879); *Brown v. Brown,* Id. 299 (1879); *Clark's Heirs v. Ellis,* 9 Or. 133 (1881); *Chrisman v. Chrisman,* 16 Or. 128, 18 Pac. 6 (1888); *Luper v. Werts,* 19 Or. 122, 23 Pac. 850 (1890); *Potter v. Jones,* 20 Or. 240, 25 Pac. 769 (1891); *Rothrock v. Rothrock,* 22 Or. 551, 30 Pac. 453 (1892).

[32]In California the statute requires the parties to be so designated, but this is a matter of convenience and does not change the remedy (Probate Code, Section 371).

ting the will to probate, alleging that the pretended will was void. The administrators with the will annexed filed an answer. As to *Luper,* this Court said:

> It is evident that this was a trial between the parties. In the Supreme Court one party is termed the appellant and the other the respondent. In the petitions named . . . the same facts are set forth as would be under the same circumstances in a bill in equity (61 Fed. 427).

The Court then turns to the question of whether the proceeding before it was a suit in equity and cites *Gaines v. Fuentes,* 92 U.S. 10, 23 L.Ed. 524 (1875). This was an action to annul a will as a muniment of title. Justice Field held that this was "not a proceeding to *establish* a will, but to annul it as a muniment of title, and to limit the *operation of the decree admitting it to probate.*[33] It is in all essential particulars a suit for equitable relief, to cancel an instrument alleged to be void . . ." Judge Knowles analyzes Justice Field's holding that a Federal Court has no jurisdiction of a proceeding to *probate* a will, by repeating Justice Field's quotation from *Gaines v. Fuentes,* as follows:

> The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties. Indeed, in the majority of instances, no such controversy exists. *In its initiation all persons are cited to appear* . . . From its nature, and from the want of parties, or the fact that all the world are parties, the

[33]This is substantially the form of the decree which we seek with reference to Article VI of the will.

> proceeding is not within the designation of cases at law or in equity (61 Fed. 427-428).

The Court then cites *Ellis v. Davis,* 109 U.S. 485, 27 L.Ed. 1006, supra, to show that the Supreme Court there made a distinction between "the probate of a will and an action to try the validity of a will between parties, and when there is a decree or judgment which affects only the parties to the action." Next the Court distinguishes the *Broderick Will* case, supra, by pointing out that proof of a will in California is of solemn character and much different from the *ex parte* mode of probating a will in Oregon. It concludes:

> The suit for contesting a will after the probating of the same in Oregon is undoubtedly one between parties, *and binding only the parties thereto,* and hence is such a one as a circuit court of the United States could take jurisdiction of when the amount in controversy is sufficient, and the parties plaintiff and defendant citizens of different states (61 Fed. 428).

The Court again considers *Gaines v. Fuentes,* supra, which it analyzes as "a suit to annul a will and limit the operation of its probate." The opinion says that the Supreme Court held, as it did, that the suit was in the nature of equitable relief, saying:

> There are no separate equity courts in Louisiana,[34] and suits for special relief of the nature here sought are not designated "suits in equity," but they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can

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[34]This is because Louisiana is a civil law state, wherein there was never any distinction between law and equity (40 C.J. Modern Civil Law pp. 1243-1244).

> be maintained in a state court, *whatever designation that court may bear,* we think they may be maintained by original process in a federal court where the parties are, on the one side, citizens of Louisiana, and the other, citizens of other states (61 Fed. 428).

The Court then applies this holding of the Supreme Court to the case at bar, saying:

> Here it will be seen that if a suit is essentially a suit of a civil nature for equitable relief, and it is customary to prosecute the same in any state court where the action arose, *whether the same is a county court or a probate court or a district or circuit court,* the proper federal court will have concurrent jurisdiction of the same with such state courts . . . It should be observed, also, that when it is customary for such state courts to hear and determine such equitable suits, a United States court, under proper conditions, may hear them. *It is not necessary that a statute should exist authorizing the same.* The suit in the county court of Oregon in such matters is not authorized directly by any statute, but is *a customary exercise of jurisdiction* (61 Fed. 428).

The Court mentions *Ellis v. Davis,* supra, and quotes from that case the part which says that a federal court has jurisdiction of a will contest where the state law permits this to be an inter partes proceeding (quoted supra).

The decision next considers the subject of adequate remedy at law and speedily disposes of that point. Then it considers the fact that the will had not been probated at the time when the bill in equity was filed. It disposes of this argument first on the theory that even if this were so, the plaintiffs should have relief in equity. How-

ever, the most weight is placed on a second ground. This is that twenty-four days after the bill in equity was filed the will was filed and admitted to probate in the Multnomah County Court. This Court held that the bill could have been amended as of the date of probating and moreover that any defect in the bill was cured by the answer of the defendants. This alleged the actual admission of the will to probate.

The concurring opinion of Judge McKenna (later a Justice of the Supreme Court) is much briefer, but is equally persuasive. Judge McKenna said that equity courts, by virtue of their general equitable powers, may not set aside the probate of a will. Then the Judge holds as follows:

> But where such a remedy is given to a state court by an action inter partes, the remedy may be adopted by the federal courts if the controversy is between citizens of different states. By the constitution of Oregon (article 7, Sec. 12) and by its statutes (Hill's Ann. Laws, Sec. 895) the county court has exclusive jurisdiction in the first instance of the probate of wills. The probate is in the common form, but the judgment is conclusive until set aside on appeal or impeached by direct proceedings (Jones v. Dove, 6 Or. 188; Hubbard v. Hubbard, 7 Or. 44); and all acts done under it in the course of administration are valid (Brown v. Brown, Id. 285). A suit, however, may be maintained in the county court to declare the will void, and revoke its probate. Clark's Heirs v. Ellis, 9 Or. 132, and cases supra. The nature of this suit is not precisely defined by the decisions, but *it is certainly inter partes,* and seems to be within the doctrine declared in Ellis v. Davis, 109 U.S. 496, 497, 3 Sup. Ct. 327. This remedy existing in the

> Oregon courts, it could be exercised by the United States circuit court, but preliminary probate of the will was essential to it (61 Fed. 435).

The concurring opinion then considers the fact that the will had not been admitted to probate when the suit was brought. This opinion says that the will was probated twenty-three days after the bill was filed although the main opinion says that it was twenty-four days. This filing, says Judge McKenna, was set forth both by plea in abatement and in the defendants' answer. So, says the Judge:

> The answer, however, brought into the pleadings the necessary condition of the maintenance of the suit, and on this fact, with the others proved, I think it was competent to the court to give relief. It was sufficient if the court had jurisdiction at the time the decree was entered (61 Fed. 436).

We have given some consideration to the contention that the will had not been probated at the time the action was brought in *Richardson v. Green,* because the opinion of the District Judge in our case says, in so many words, that this made all the rest of the decision dictum! We will consider this in more detail when we discuss fully the District Judge's refusal to follow *Richardson v. Green.* Of course, the Jackson will was admitted to probate before this action was commenced. This does not in the slightest degree change the binding effect of *Richardson v. Green* upon a District Court, so long as *Richardson v. Green* remains the unquestioned law of this circuit as stated by this Court and as at least left untarnished by the refusal of the Supreme Court to grant certiorari.

We repeat that *Richardson v. Green* is the only decision, State or Federal, which has decided one of the important questions which has been presented to this Court, viz. that our attack on the ground of fraud and undue influence is *inter partes*. However, this Court sustained *Richardson v. Green* in *Carrau v. O'Calligan,* 125 Fed. 657. This case arose in the State of Washington. It involved an action by foreign heirs to set aside a nuncupative will which had been admitted to probate. The jurisdiction of the Federal Court was vigorously attacked. The decision of the District Judge appears in 116 Fed. at page 934. It is interesting to note that the District Judge upheld federal jurisdiction. He said, concerning defendants' jurisdictional arguments, that they had been

> . . . decided adversely to the contentions of the defendant, by the supreme court of the United States, and by the circuit court of appeals for the Ninth circuit; and, as the courts of last resort have settled the law, it would be unbecoming for this court to discuss the questions further. Every point made in the defendant's argument has been squarely met and fully answered by the opinions in the cases of Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Gaines v. Fuentes, 92 U.S. 10, 22, 23 L. Ed. 524; Byers v. McAuley, 149 U.S. 608, 621, 13 Sup. Ct. 906, 37 L. Ed. 867; **Richardson v. Green**, 9 C.C.A. 565, 61 Fed. 423, 436; Id., 159 U.S. 264, 15 Sup. Ct. 1042, 40 L. Ed. 142 (116 Fed. 934).

The District Judge in *Carrau* overlooked the difference between the state practice in the cases cited and the state practice in Washington. The Circuit Court of Appeals for this Circuit did not overlook the difference.

A distinguished bench decided the *Carrau* case for this Court; namely, Judges Gilbert, Ross and Morrow, Judge Ross speaking for the Court. This Court reversed the District Court, because of the Washington law on the subject of will contests. It held, on the authority of *Broderick's Will,* that the general rule is that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. Then the decision considered the question of jurisdiction in states which have a different system, and in particular the State of Oregon. The Court said:

> But wherever, by the law obtaining in a state, customary or statutory, suits in equity may be maintained in the courts of such state to set aside the probate of a will, similar suits may be maintained by original process in a federal court, where the requisite diverse citizenship and other requisite conditions exist. Thus, *in the case of Richardson et al. v. Green . . . this court affirmed the decree of the lower court which canceled the will; thus sustaining the jurisdiction of the federal courts in the matter.* But it did so for the reason, as plainly appears from the opinions of the judges deciding the case, that it was found that while, under the laws of Oregon, the county courts of that state were given exclusive jurisdiction in the first instance to take proof of wills, there was no provision of the Oregon law "to warrant any contest upon the validity of a will at the time the same was being probated," but authority in any one interested in the estate *to attack the will by an independent suit at any time after its probate.* This court, having found that such a remedy existed in the Oregon courts, very properly held that it could be exercised by the United States Circuit Court for

> that state, the requisite diverse citizenship and other requisite conditions existing (125 Fed. 663).

But, says the Court, the law of Washington is different. It recites the various provisions of Washington law as to the probate of wills and contests thereof. These are just as elaborate as the California law discussed in *Broderick's Will.*

Carrau v. O'Calligan went to the Supreme Court and is there reported as *O'Callaghan v. O'Brien,* 199 U.S. 89, 50 L. Ed. 101 (1905). The Supreme Court, after analyzing *Broderick's Will, Gaines v. Fuentes,* supra, *Ellis v. Davis,* supra, and *Byers v. McAuley,* supra, held that the following principles were established: First, "matters of pure probate" are not within the jurisdiction of the federal courts, and second, "where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes,* the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States . . . will enforce such remedies . . ." The Court then held:

> The cited authorities establish that the words referred to must relate only to independent controversies *inter partes,* and *not to mere controversies* which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect (199 U.S. 110, 50 L. Ed. 111).

Then follows language which is most significant. The Court said:

> Thus, if a state law provides for any form of notice on an application to probate a will, and authorizes a contest before the admission of the writing to probate, then it would follow, if the words "suit or action of *inter partes*" embraces such a contest, the proof of wills, if contested by a citizen of another state or alien, would be cognizable in the courts of the United States, and hence not under the exclusive control of the state probate court. Again, if a state authorized a will to be proved in common form, that is, without notice, and allowed a supplementary probate proceeding by which the probate in common form could be contested, then, again, if such a contest be a suit inter partes, it would also be a Federal cognizance (199 U.S. 111, 50 L. Ed. 111).

The Court next analyzes the statutory provisions in Washington as they are analyzed in the decision of the Circuit Court of Appeals and concludes that in Washington the contest "is an essential part of the probate procedure . . . and does not therefore cause a contest when filed, to become an ordinary suit between parties." (199 U.S. 114, 50 L. Ed. 111.) Having so concluded and having discussed the Supreme Court's decisions pro and con, it was unnecessary for the Supreme Court to discuss *Richardson v. Green,* which held that in Oregon the proceeding was inter partes.

From the foregoing, it is clear that in Oregon the statute provides for the proving of a will in common form without notice. It is equally clear that a direct pro-

ceeding is allowed in Oregon, whereby probate in common form may be contested. This brings us to the paramount question: Is that contest a suit inter partes? The suit is in the form of a suit in equity. It is instituted by a petition. Its process is a citation. The citation may be issued to such persons as the contestant or plaintiff selects and the result of the case, if favorable to plaintiff, *is binding only upon the parties cited.* The case is tried as an equity case. In such a suit between parties or is it between the contestant and the rest of the world; i.e., in rem? Surely, that question has been answered in *Richardson v. Green.*

However, Judge Mathes held that *Richardson v. Green* is distinguishable. With the utmost deference, we are compelled to say that the attempt of the District Judge to distinguish is not persuasive. The distinction starts with the following statement concerning Richardson:

> This case contains jurisdiction of questions only *superficially* similar to those raised in the case at bar.

Our only answer to the adverb italicized is to offer in evidence the main opinion, the concurring opinion and the Carrau opinion. The supposed distinction is set forth on pages 45 to 47 of the record. We respectfully refer this Court to the opinion because it would even more unduly extend this brief to quote the opinion at length. Suffice it to say, these are the points made—most of them erroneous, as we respectfully submit:

First, in *Richardson v. Green,* plaintiff was seeking an adjudication that a deed and a will were forgeries.

Second, the purported will had not been admitted to probate or offered for probate.

Third, the Circuit Court of Appeals held that the Federal Court had jurisdiction as to both the deed and the will because they were suits in equity cognizable in the Circuit Court of Oregon—a state court of general jurisdiction.

Fourth, the attack upon the deed would ordinarily have been the subject of an action at law, but the legal remedy was inadequate because of the grantee's right of curtesy.

Fifth, since the will which had not yet been proved in the Probate Court, the attack upon the validity of the will was within the *in personam* jurisdiction of courts of equity.

Sixth, upon the peculiar facts of the *Richardson* case, the decision was an unnecessary but nonetheless correct view of Oregon equity jurisdiction, because *Richardson* was a suit to contest an unproved will. But, says the District Judge's opinion:

> The holding may not correctly be extended to include the *dictum* as to actions to set aside wills after the probating of the same in Oregon (R. 46).

Seventh, assuming that this "dictum" is considered a part of the decision, the Act of 1893 (now ORS 115.180) was passed while *Richardson v. Green* was pending. This enactment has been interpreted by the Oregon courts as conferring exclusive jurisdiction over will contests upon Probate Courts as such, citing *Florey v. Meeker,* supra, 194 Or. 257, 240 P.2d 1177, 1187.

We will consider these supposed distinctions in order:

First, it is true that plaintiff was seeking an adjudication that a deed and a will were forgeries.

Second, it is true that the purported will had not been admitted to probate or offered for probate when the suit was commenced. However, it was admitted to probate twenty-four days later.

Third, it is entirely incorrect to say that this Court upheld federal jurisdiction because the causes of action "were suits in equity cognizable in the Circuit Court of Oregon—a state court of general jurisdiction." Judge Knowles clearly held that it made no difference what Court would take the case in Oregon so long as some proceeding *inter partes* was available. He said that so long as the suit could be prosecuted in any state Court where the action arose "whether the same is a county court or a probate court or a district or circuit court, the proper federal court will have concurrent jurisdiction." (61 Fed. 428.)

Fourth, the Court did say that the attack upon the deed would have been the subject of an action at law, because the common law actions for the possession of real property are actions at law. It is true that as to the deed, the *Richardson* case was properly in equity. What about the will? Neither of the judges in *Richardson* held that the Federal Court had jurisdiction solely because there was no adequate remedy at law. Almost the entire opinion in *Richardson v. Green* was devoted to the proposition that some form of action *inter partes* to attack the will would lie in a state Court, irrespective of the particular Court designated by Oregon law.

Fifth, as to the fact that the will had not yet been proved in the probate court, both judges gave this point careful attention. We deny categorically that either judge held that the attack upon the validity of the will is within the *in personam* jurisdiction of the state Court *because* the will had not been probated. The decisions were directly contrary. This subject requires further analysis.

Judge Knowles started his discussion with this statement:

> There is another question of more moment and difficulty presented in the fact that at the time the bill was filed in this action the will had not been probated (61 Fed. 429).

After his discussion of the subject of adequacy of the legal remedy, he says:

> But let it be conceded that as a rule of law the relief asked in this bill *could not be granted until the will was probated,* that no rights in relation to it capable of being contested between the parties could arise, then how stands this case? (61 Fed. 431.)

Judge Knowles went on to show that the will had been probated in Oregon within twenty-four days after the bill was filed. This probate had been alleged in defendants' plea in abatement and their answer. He upheld the complaint and his jurisdiction on two grounds. One was that the bill could then have been amended to allege the probate of the will, "although it was a fact that occurred after the suit was filed and 'a condition of bringing' the suit." (61 Fed. 431.) Thus it was clearly held that the attack must be made after probate and not before

probate. Judge Knowles held that the plea and the answer *cured the insufficiency of the bill.*

Judge McKenna also referred to the fact that the will had not been probated. He said, "This probate had not been made when the suit at bar was brought. It therefore follows that no cause of action existed to cancel the will." (61 Fed. 436.) (Thus also holding, as had Judge Knowles, that probate of the will was essential.) Judge McKenna then said that the answer alleged the probate of the will. "The answer, however," he held, "brought into the pleadings the *necessary condition* of the maintenance of the suit, and on this fact, with the others proved, I think it was competent to the court to give relief. It was sufficient if the court had jurisdiction at the time the decree was entered." (61 Fed. 436.)

Surely it must be clear that both judges decided the case upon the theory that there must be a probated will to establish the jurisdiction of the Court. How, then, was it possible for the District Judge in our case to say that *Richardson* involved an "unprobated will"; that the attack in *Richardson v. Green* (was) "upon the validity of the will, as yet unproved". The foregoing disposes not only of the fifth distinction, but also the sixth distinction. This is based upon the theory that the Court's decision was "dictum".

At the risk of prolixity, may we suggest that there is no possible basis for the District Judge's statement that "the holding (in Richardson) may not correctly be extended to include the *dictum* as to actions to set aside wills 'after the probating of the same in Oregon'?" (R.

46.) Had there been a *dictum,* it would have been a statement that there was no jurisdiction before probate. The decision was concerned solely with a contest of a will after probate.

This brings us to the seventh alleged distinction, viz., that the Act of 1893 "has since been interpreted by the Oregon courts as conferring exclusive jurisdiction over such will contests upon the probate courts as such." (R. 47.) In the first place, as we have already demonstrated, the Act of 1893 did not change the law applicable to the prosecution of will contests, except that it provided for a statute of limitations. We have shown that if the Act of 1893 enacted any new law, other than provisions for the production of wills and creating a statute of limitations, any such other part of the Act would have been unconstitutional and void. We have established that the 1893 statute did not confer any jurisdiction upon Probate Courts, because the Probate Courts were always the Courts which had jurisdiction of will contests. The fact that jurisdiction is in the Probate Court is of no consequence. All of the decisions of Courts of last resort hold that it makes no difference whether the Court is one of general jurisdiction or a Probate Court. The form of the action is the touchstone of federal jurisdiction.

Finally, as we have already mentioned, the citation of *Florey v. Meeker,* supra, is erroneous. It is cited by the District Judge to a point which it did not touch upon. The District Court cited *Florey* as holding that the Act of 1893 has been interpreted "as confining exclusive jurisdiction over such will contests upon the probate courts

as such, . . . and not upon the Oregon courts of general equitable jurisdiction, . . .'' The only thing in *Florey* which has even a shadow of relevancy is its holding that if a party wishes to attack a will, he must do so in the Probate Court. We have said this repeatedly. *Florey* does not say that the Act of 1893 conferred such jurisdiction.

It is respectfully submitted that *Richardson v. Green* is not distinguishable. It is still the law in this Circuit and should be followed. It accords with all of the applicable decisions of the United States Supreme Court and of the Courts of Appeals in other circuits. *Richardson* was approved by this Court in *Carrau v. O'Calligan.* No good reason for overruling *Richardson* has ever been advanced.

VIII. CONCLUSION.

It is respectfully submitted that the District Court manifestly had jurisdiction of the first three claims and the sixth claim for relief of the amended complaint. This being so, the District Court committed error when it dismissed the entire action because of its erroneous opinion that it had no jurisdiction over the fourth and fifth claims for relief. Actually, the court had such jurisdiction. It should have asserted its jurisdiction, because it was bound by the decision in *Richardson v. Green* as followed in *Carrau v. O'Calligan,* and by the Oregon cases as construed in *Richardson v. Green.* It is respectfully submitted that the judgment should be reversed with direc-

tions to the District Judge to deny the motion to dismiss *in toto.*

Dated, March 4, 1959.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Oregon Revised Statutes Relating to Wills and the Probate and Contest Ttherof.

Chapter 114—Wills

114.010—*Term "will" includes codicil.* The term "will," as used in this chapter incudes all codicils.

114.020—*Who may make wills; limitations.* Every person of 21 years of age and upward, or who has attained the age of majority as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal, saving to the widow, if any, her dower, and to the widower, if any, his curtesy.

114.030—*Will to be in writing; execution; attestation.* Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator.

114.040—*Person signing testator's name to sign his own name as witness.* Any person who signs the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request.

114.050—Refers to will of mariner or soldier.

114.060—Refers to nonresident's will.

114.070—Refers to devise or bequest to trustee of existing trust.

114.110-114.150—Refer to revocation of wills.

114.210-114.270—Contain rules of construction.

114.310-114.370—Refer to witnesses as beneficiaries.

114.410-114.440—Refer to deposit of wills with the County Clerk before death and opening after death.

Chapter 115—Initiation of Probate or Administration

115.010—*Pleadings and mode of procedure.* No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinguished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:

(1) A citation to a party.

(2) A verified petition of a party in interest.

(3) A subpena to a witness.

(4) Orders and decrees.

(5) An execution or warrant to enforce its orders and decrees.

115.020—*Contents of petition to prove will or to appoint executor or administrator.* A petition to prove a will or for the appointment of an executor or administrator shall set forth the facts necessary to give the court jurisdiction and also state whether the deceased left a will or not and the names, age and residence, so far as known, of his heirs.

115.110—*Custodian of will must deliver to proper court; liability.* Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.

115.120—*Persons entitled to petition for proof of a will.* Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same is in his possession or not, or is lost or destroyed or beyond the jurisdiction of the state or is a nuncupative will.

115.130—*Order for production of will.* If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order.

115.140—*County in which proof of will shall be taken.* Proof of a will shall be taken by the probate court of a county as follows:

(1) When the testator, at or immediately before his death, was an inhabitant of the county, irrespective of the place he may have died.

(2) When the testator, not being an inhabitant of this state, died in the county, leaving assets therein.

(3) When the testator, not being an inhabitant of this state, died out of the state, leaving assets in the county.

(4) When the testator, not being an inhabitant of this state, died out of the state, not leaving assets therein, but where assets thereafter come into the county.

(5) When real property, owned by the testator at the time of his death is situate in the county, and no other probate court has gained jurisdiction under any of the preceding subsections of this section.

115.150—Refers to probate and proof of nuncupative wills.

115.160—Refers to establishment of foreign will.

115.170—*Testimony of attesting witnesses; affidavits; depositions.* (1) Upon the hearing of a petition for the probate of a will ex parte and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. If an attesting witness is outside the reach of a subpena of the court having jurisdiction of the probate of the will such witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

(2) However, upon motion of any person interested in the estate within 30 days after the order admitting the will to probate is made, or upon the discretion of the

court within that time, the court may require that the witness making the affidavit be produced before the court for further examination, or if the witness is outside the reach of a subpena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

(3) However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

115.180—*Contest of will.* (1) When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest the same or the validity of such will; but, if a person entitled to contest the probate of a will or the validity thereof is laboring under any legal disability, the time in which he may institute such contest shall be extended six months from and after the removal of such disability.

(2) Any will made pursuant to ORS 114.060 may be contested and annulled within the same time and in the same manner as wills executed and proven in this state.

115.190—*Letters testamentary; administrator with the will annexed.* (1) When a will is proven, letters testamentary shall be issued to the persons therein named as executors, or coexecutors or to such of them as give notice of their acceptance of the trust and are qualified. If

all the persons therein named decline to accept, or are disqualified, letters of administration with the will annexed shall be issued to the person to whom the administration would have been granted if there had been no will.

(2) Where a bank or trust company is named in a will as executor or coexecutor, and such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, letters of administration with the will annexed shall be issued to such converted, consolidated or purchasing company if it is otherwise qualified.

115.200-115.210—Refer to issuance of letters of administration where will declared inoperative and form of Letters Testamentary.

115.310-115.350—Refer to initiating adminstration and appointment of special administrators and form of Letters of Administration.

115.410-115.520—Refer to qualification and duties of executors and administrators.

115.990—Refers to penalties.